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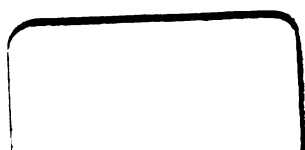
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*C. Wingate*

THE

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THE

# JOURNAL OF JURISPRUDENCE.

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## EMINENT SCOTTISH LAWYERS OF THE LAST CENTURY.

### No. V.—LORD MONBODDO.

THE name of Burnett is unquestionably one of great antiquity. There seems good ground for holding that originally it was identical with that of Burnard in England. The Burnards find a place in Domesday Book, and were for centuries a most important family in Wiltshire. What brought the Burnards across the Tweed, or what, when there, induced them to turn the name into that of Burnett, history states not. Naturally the district in which they at first settled was the south of Scotland, and in Laing's Collection of Ancient Scottish Seals we find that of Sir Richard Burnard of Farningdoun, in Roxburgh, appended to a charter of date 1252. But the family in course of time found their way further north, and in the next century made their headquarters in the district of Aberdeenshire, where they have ever since remained. Under the patronage of King Robert the Bruce they acquired valuable estates. To have obtained an estate from Robert the Bruce is, we know, in Scotland as high an honour as to have come over with the Conqueror would be in England. In the middle of the fifteenth century we find the head of this family or class established at Crathes Castle, which has continued down to the present time to be their principal seat.

The family of Burnett has in more modern times taken a distinguished place amongst old Scottish houses on account of the talents and success which have characterized not a few of its representatives and cadets. Gilbert Burnet, the Bishop of Salisbury, was not the first of that name or family who had won for himself a reputation as a man of letters and a professor. Another Gilbert, older by two generations, lectured on philosophy at Basle, and was a great man amongst the continental Protestants. Sir Thomas, the first baronet, exhibited his zeal for the encouragement of learning by endowing three bursaries in King's College, Aberdeen. He and his brother, James Burnett of Craigmyle, were keen Covenanters, but distin-

guished at the same time by a moderation and discretion which gained them influence with both parties. From this James are descended the Burnetts of Kenmay and the Burnetts of Monboddo. Sir Thomas had another brother, Robert, a lawyer, and of great eminence at the Bar, who stuck by the Royal cause, was an exile under Cromwell, and made a Judge of the Court of Session by Charles. The youngest son of this judge was Bishop Gilbert Burnet, perhaps the most celebrated of the whole family. Burnett is described by Wodrow as "the learned and moderate Bishop of Sarum, one of the great eyesores of the Highfliers and Tories in England, and a very great ornament to his native country." He seems in respect of character to have inherited from his father nothing but an attachment to Episcopacy, for in politics he was a liberal and moderate man, and came, as we know, to be most thoroughly hated by James II. and his party. It is singular that, although he committed the almost unpardonable sin of becoming a prelatist and even a prelate, men such as Wodrow should sound his praises. But, in truth, his valuable services in the cause of the Revolution gained him favour even with extreme fanatics; and while the saintly Leighton is dismissed with a sneer, the more worldly-minded Burnet is held up to admiration.

The family of Monboddo, as has been already said, is descended from James Burnett of Craigmyle, who acquired considerable estates by marriage. The first Laird of Monboddo was this gentleman's third son. He married a sister of Irvine of Monboddo, and afterwards acquired from his brother-in-law the family estate. James, his grandson, married to one of the Forbeses of Craigievar, was the father of the subject of this memoir, who was born at Monboddo house, Kincardineshire, in 1714.

Burnett had no lack of University education. After getting out of the hands of his tutor, he was sent to Marischal College, Aberdeen. Here we are told he "was remarkable for his proficiency in ancient literature, particularly the Aristotelian philosophy." Being intended for the legal profession, his mind had however to be directed to the study of the civil law, which in those days was not considered to receive proper attention in this country. Accordingly he was despatched to Gröningen, in Holland, where he resided for three years. An advocate must always end his University career in Edinburgh, and therefore, after having obtained a sufficient knowledge of the Pandects, we next find him in that city. It is said that he arrived here upon the day of the Porteous riot, and that his first slumbers were disturbed by the rioters passing his house. It is also said that he actually witnessed the tragedy. Burnett was called to the bar in 1737, and soon obtained considerable practice. He was counsel for Archibald Douglas, the defender in the great Douglas cause. In this capacity he paid several visits to France, where the facts which formed the subject of dispute had taken place. In 1760, he married a Miss Farquharson, a lady

of great beauty, by whom he had a family of one son and two daughters. He was appointed Sheriff of Kincardineshire in 1764, and in 1767 he was raised to the bench as successor to Lord Milton. He then took the title which he derived from his patrimonial estate.

It is as Lord Monboddo that Burnett is known to the world. The leisure of the bench afforded him time for his literary work, for his annual journeys to London, for much social intercourse and famous classical suppers. He has obtained a wonderful reputation for eccentricities even at a time when every man of note (judges, professors, and so forth) seemed to do what was right in his own eyes, and walk in paths of his own choosing.

But Monboddo wandered more out of the beaten path than most men. He did not hold ordinary opinions, and very ordinary acts were performed by him in an extraordinary way—he did not sit on the bench, nor entertain his friends at supper, nor journey to London in the same way as his brethren did. Instead of taking his place among the “auld fifteen,” he sat at the clerk’s table. That he did so seems a fact, although the reasons given for this proceeding differ. Cockburn says that some offence had made him resolve never to sit on the same bench with President Dundas, and that his vow was kept even after Dundas was gone. Others attribute it to his deafness, which rendered his seat on the bench inconvenient. It is also said that the first occasion on which he took up this more humble position was when he gave judgment in the Douglas cause—decided in the Court of Session immediately after he was made a Judge. He had been, as we have said, counsel in this case, and felt some delicacy in delivering his opinion from the bench.

The suppers—“excellent suppers,” as Cockburn calls them—which he was in the habit of giving weekly were got up in imitation of the ancients. Following their example, he anointed himself with oil, took air-baths, looked but coldly upon modern garments, longing for the freedom which in classical ages the human form had enjoyed, and eschewing—when he travelled—carriages, as being characteristic of modern degeneracy.

It is perhaps to be regretted that Monboddo’s memory should be kept alive only by tradition of his odd manners and opinions. “It is more common,” as has been remarked, “to hear anecdotes about his maintaining that men once had tails, and similar follies, than about his agreeable conversation and undoubted learning.”

His opinions are contained in his works, and may be found there by the curious. Of his strange doings not a few traditions have come down to us. London, as well as Edinburgh circles, could tell of his eccentricities. In the literary society of the metropolis, he was wont to take a place, and give out anew the metaphysical theories of which Edinburgh had grown weary. He was favourably received at Windsor, where doubtless he found a patient and believing listener in the King. At the house of the Garricks he is said

to have met with and proposed to Miss Hannah More. Afterwards, talking to Mrs. Garrick about the refusal with which she had met his offer of heart and hand, he remarked, "It is a pity, for I should like to have taught that nice girl Greek." The following London anecdote found its way into the newspapers of the time. In May, 1785 he was present as one of the audience in the King's Bench. A false rumour that the roof was falling had soon the effect of clearing the Court—judges, barristers, attorneys, clerks and lawyers fled in undisguised confusion. The deaf old Scotchman sat still, unmoved, ignorant of the cause of this exodus. Upon being asked afterwards why he had not joined the others, he quietly remarked that he thought it was an annual ceremony, with which, as an alien to the laws of England, he had nothing to do.

As he objected to be dragged at the tail of a horse, he always performed his journeys upon its back. While making his last return journey from London, he was seized with severe illness, and persuaded by a friend to take a carriage for remainder of that stage; but by the time he entered Edinburgh he had returned to his usual mode of travelling.

"Classical learning, good conversation, excellent suppers, and ingenious though unsound metaphysics, were the peculiarities of Monboddo. . . . All who knew him in Edinburgh concur in describing his house as one of the most pleasant in the place." So says Cockburn, who remembers Monboddo as one of the legal giants just removed from the Bench by the hand of death at the time when he himself had commenced his professional career. Learned talk and good suppers were not, however, the only attractions at 13 John Street, Canongate. Miss Burnett was the great Edinburgh beauty of her day, in whose honour toasts were given and sonnets made. It is of her that Burns (a frequent guest of Monboddo's) speaks in his address to Edinburgh—

"Fair Burnet strikes the adoring eye."

Alas! it fell to the same poet to write her elegy. Monboddo was indeed unfortunate in his domestic affairs. Early left a widower, he also lost by death his only son, and this beautiful daughter at at the age of twenty-five. Burns' lines are very characteristic of the period, but not of the poet. Life is described as having never exulted in so rich a prize, and "envious death" as never having so triumphed in a blow. Groves, streamlets, and woodland choirs have ceased to charm, and so forth.

To the conversational powers of Burnett Johnson pays an elegant tribute in his journal. "Early in the afternoon," he says, "Mr. Boswell observed that we were at no great distance from the house of Lord Monboddo. The magnetism of his conversation easily drew us out of our way, and the entertainment which we received would have been a sufficient recompense for a much greater deviation."

At the suppers which he got up in imitation of the ancients, his

usual guests were Drs. Black, Hutton and Hope, so well known in the Edinburgh society of that period, and William Smellie, the printer, a literary character, who has written the lives of several Edinburgh celebrities, and it seems from what his son tells us, had intended to write that of Monboddo himself. It is much to be regretted that this intention was never carried out, as from what we know of Monboddo's writings his conversations must have been very interesting. This gentleman had admirable opportunities of playing the part of a Boswell. All that we learn is, that at these suppers, and in society generally, Monboddo was fond of insisting upon and defending his peculiar theories, which he did with much skill. His sayings not having come down to us, we must be contented with what he has written. His good constitution, or, as he would more probably have told us, a strict adherence to the laws of nature and the customs of the ancients, carried him to a good old age. He died on the 27th of May, 1799, at the age of eighty-five. Three days later there died another eminent member of the Scottish Bench, Justice-Clerk Braithfield, still remembered for his great talents as well as for less enviable qualities.

Monboddo was a good and successful lawyer, an independent, and, though occasionally eccentric, a useful judge. But his mind does not seem to have been given chiefly or in the first place to law. He is said to have refused a seat in the Justiciary Court through a fear that the additional labour would interfere with his beloved literary work. Writing of his taste for the study of Greek philosophy, he describes it as one "which, though never quite extinguished, had been lost for some time amid the hurry of law business." But with what greed did he return to the pursuits of his college days, when the leisure of the bench permitted him. Though so fond of writing, he has done nothing to enrich professional literature, and he has not even made use of law, after the manner of Kames, as a means of introducing his own philosophical theories. The antiquities which attracted him were far older than Scottish history could supply, the *Regiam Majestatem* must have been in his eyes but a modern production at the best. He has, however, done his duty as a reporter, as the collection of decisions contained in the last volume of Brown's Supplement will testify. For a specimen of his judicial talents the reader may take his advising in the Douglas case.

But Monboddo has won for himself a name as an author, although not in the field of legal literature. Leaving the Institutes of our law to be dealt with by Erskine and Wallace, its antiquities to be criticised by Hailes, and its philosophy to be developed by Kames, he devoted himself to the grand and ambitious study of mankind. The energy and enthusiasm which he displays in the pursuit of his favourite investigations should secure for him our respect, even although we may be of opinion that his talents were misdirected. He is the author of two great works—great at least in point of size,—*The Origin and Progress of Language*, and *Ancient Metaphysics*. Each treatise consists of six volumes—not the small



modern volumes, but such as our sturdy forefathers were wont to handle. To have filled even with the wildest nonsense so many pages would have entailed hard work, and Lord Monboddo did not write nonsense, although he sometimes wrote what closely resembled it. The first volume of the *Origin of Languages* was published in 1773, the sixth in 1792. But while this work was in progress there appeared from time to time volumes of the *Ancient Metaphysics*, the publication of which also extended over a number of years. The two books should be studied together, and the learned author evidently expected the readers of the one to know something of the other. Both have the same object, viz., to throw light upon the history of mankind. In these works Monboddo has advanced views which have at all events secured for him a certain kind of fame. Many have heard of him who know nothing of the Court of Session, and to whom the title of "Senator" is meaningless. He might have been twice as learned and persevering an author, and yet have sunk, along with a whole host of last century writers, into hopeless obscurity. But from this fate his fantastic theories have saved him, and although the works themselves are forgotten, a tradition of their author is preserved.

Recent events in scientific circles have served to revive this tradition. The neglected works have been called to mind, and may even have been searched for in libraries. There is a certain school of critics who imagine that they have greatly damaged any theory which is objectionable to them when they can show that it is not so entirely original as is supposed. If they can find a trace or hint of it, however vague, in the literature of the past, they come down upon it as if the author of this theory were the applicant for a patent. It is pronounced to be exploded and unworthy of credit. Opponents of Darwin have thus availed themselves of Lord Monboddo, and actually attempted to dispose of Evolution by telling us that it was an idea originated by an eccentric judge, and laughed over by his contemporaries a hundred years ago. But Monboddo did not discover evolution. He just speculated upon a few of the problems for which this theory offers a solution, and our modern philosophers may derive useful hints from him, although they may think his learning of little use, and smile at his collection of facts. We can indeed imagine with what enthusiasm Monboddo would have embraced the theory of Darwin, although with the materialism to which it leads he would have had no sympathy. His philosophy still left a place for the Deity and for a revealed religion, and he only kept at a respectful distance from revelation when it clashed with his theories.

Let us give some idea of his main argument in *The Origin of Language*, his first work. The motto from Horace upon his title-page assists us :

Mutum ac turpe pecus —  
Donec verba, quibus voces sensusque notarent,  
Nominaque invenêre.

He undertakes to prove that language is not natural to man ; “ that we do not speak by nature without use or instruction, in the same manner as we perform many functions of the animal nature.” By speaking he means not the use of a formed language, but of any articulate sounds intended to express conceptions of the mind. According to him speech is entirely an acquired art, and that not prior to the formation of societies, but subsequent to that formation. This leads him, in the first place, into a consideration of the ideas expressed by language. Man does not by nature form ideas ; nature does no more than furnish the materials from which either mediately or immediately ideas are derived. Of course if, as he expresses it, man is the architect of his own ideas, it would be absurd to maintain that language—the object of which is to convey them to others—was not an acquired art. But he derived his argument not only from the nature of ideas, but also from the nature of articulation. Until he has reached a stage in life no man can speak ; and solitary savages have been found here and there who, although suffering from no impediment, were mute. Such a one was the wild boy Peter, caught in the woods of Hanover early in the last century, and who is made use of by Monboddo as an illustration of several of his theories. In 1782 he made, we may mention here, a pilgrimage to England to see Peter, then an old man ; he found him quite tame, and although he had never acquired the art of speaking, he had so far conformed to the customs of the country as to drink beer and spirits. But our author brings forward not only isolated savages, but a whole people speechless, or at least struggling with the difficulties of articulation. This, he says, is the case of the ourangoutans, who are like men in appearance, live in society, use weapons, make huts ; and yet, “ though they have made some progress in the arts of life, they have not come the length of language ; and accordingly none of them that have been brought to Europe could speak, and what seems strange, never learned to speak.” In his later work, the *Ancient Metaphysics*, he tells us of one ourangoutan who served on board a Jamaica ship as a sailor, and of another who had such a sense of honour that he could not bear to be exposed as a show. He also informs us that his observations upon this subject excited much attention amongst the members of the Royal Society, who intended to send out a man to Africa for the express purpose of making inquiries. But he adds, “ it seems the Society at present are otherwise employed.” Further, he maintains that it is not easy to acquire the mechanical part of speaking. Sounds peculiar to another language are with difficulty if ever acquired by us. Those who are deaf can only learn with the greatest labour to use their organs of pronunciation. Naturally they break out into inarticulate cries, just as he supposes men in a primitive condition did.

But, having made so much of these difficulties, he is met with the objection that language was beyond man’s powers to acquire, and

must at first have been bestowed as a gift upon him. This view of the question does not meet with his approval. It affords too easy a solution of the problem with which he is dealing. He is, as we have indicated, a reverent man, and feels quite respectful towards the account given in the Scriptures of the origin of the race; but then he says it does not belong to him, "as a philosopher or grammarian, to inquire whether such account is to be understood allegorically, according to the opinion of some divines; or literally, and as an historical fact." Not understanding the original language of those books, he thinks himself but ill qualified to judge. Besides, if the story be in a literal sense true, the gift of speech may have been lost, and it is his duty to show how it was restored. Having made this explanation, he returns to his beloved apes and speechless savages, and pursues with a good conscience his speculations. It was, in his opinion, society—the political state—which gave rise to language. The solitary savage might get the length of forming ideas; but as he could have no occasion for them, he would never invent expressions for such ideas. Man, he thinks—as did Aristotle before him—takes up a middle place between those two great divisions of animals, the solitary and the gregarious. "He is social and he is not social." He carefully guards against Hobbes' theory, that men in a natural state are at war with each other. Hobbes derived his ideas from the corrupted, deteriorated specimens which civilization has produced. A natural savage, such as Monboddo delighted to picture, neither felt aversion for nor inclination towards society. A number of strange stories of savage life, taken from the narratives of both ancient and modern travellers, are here given, the author placing implicit belief in the veracity of his authorities. Amongst others there is one of a race of men with tails like cats, seen by a Swedish voyager in 1647. They inhabited an island in the Gulf of Bengal, possessed canoes, and were sufficiently alive to commercial interests. But all these savage races had no political life, and were destitute of language. They might herd together like cattle, even engage in a common business, but they were without rule or government. In the next stage we find them compelled to submit to some government, but that only when under the influence of fear—submitting to a rule in time of war which they abandoned upon the return of peace. In a more advanced state of things, a permanent rule is established, and men are united by the social bonds. Civil society is not of nature, but has its origin in the necessities of human life. When established, arts follow as a matter of course, and amongst them language. He is here met by the objection that there could be no society without language. But if there is some other method of communication possible, then language is not necessary to the formation of society. Men can communicate by means of imitative cries, expressions and gestures, and by these means he supposes men to have communicated for ages before the difficult art of language was practised. Some tribes,

such as the ourangoutans, have still to content themselves with such expressions of their ideas, and to struggle on as best they can without a language. Another objection which he boldly encounters is, that the law of nature supposes men to have been originally rational and political. To say so is, in his opinion, to beg the question, and shows an ignorance of what really is the law of nature, that law *quod natura omnia animalia docuit*. With the delight of a Scotch lawyer he flies to his *Corpus juris*. What in modern times is called the law of nature is not the *jus naturæ* of that great work, but the *jus gentium*. The true law of nature is instinct. It was the only law which governed men at first; afterwards came a law of nations where there were nations, and then men recognised a God, revered their parents, acknowledged each other's rights, and so forth.

Men, he supposes, continued for long ages without speech. So artificial a thing is speech, and so ingenious, that it could not easily or at once be discovered. Even painting may have been used as a means of communication before speech. He thinks it possible that the first language among men may have been music, ideas being communicated by a variety of tones. He starts man, however, at the first with the power of making inarticulate cries, such as other animals possess, and upon these cries he is himself inclined to found language. From them a language was gradually formed; in the early stages vowels being used, consonants coming into use afterwards. The first words were probably long, like most natural cries of animals, and were shortened as the art became more perfect. His observations upon these points are illustrated by references to such savage vocabularies as he had access to. He is unwilling to believe that language as an art was developed in one country and communicated to others in course of ages. At the same time he is averse to the idea that each petty tribe could make this great discovery for itself. "So difficult an art as language has not been the invention of very many nations." Once invented, it ran no danger of being lost, and was propagated with facility. His own opinion points to Egypt for the origin of those languages with which we are most acquainted. Many facts, he thinks, support this opinion. We have the acknowledged antiquity of the Egyptians, compared with whom the Greeks were "as children and of yesterday"—their learning, which we can trace back to so very distant a date, and the influence which, by means of colonies and conquests, they exercised on surrounding nations. In them we find a people whose ideas at last found expression, and to whose ingenuity we are much indebted.

Having stated his theory of the origin of language, our author proceeds, in the five remaining volumes of his work, to trace its progress. In doing so he may exhibit more wisdom, but he is less original and interesting. There is first an elaborate analysis of language, dealing with all the mysteries of syntax and of composition. He next treats of the excellences and defects of different lan-

guages, both ancient and modern. We have then an inquiry into various literatures; and the last volume is devoted to the subject of rhetoric. All through it is interesting to observe the warm enthusiasm which he exhibits for the language of ancient Greece. It is the most philosophical, its alphabet the most perfect—in short, every beauty which a language can possess is to be found in it. All hope for the future lies in the revival of Greek literature. The passion which, as a youth, he had displayed at Aberdeen, had lost none of its force towards the end of his long and arduous professional career.

It was only to be looked for that a work such as this, containing novel theories boldly expressed, should call forth hostile criticism. In the preface to the third volume he says that he has begun to be sensible that his work is not of a fashionable or popular kind. He expects that his account of human nature in its infantine state will give great offence, and his attempt to revive the old philosophy of Plato and Aristotle "will much displease those who think we have arrived to the summit of philosophy and science of every kind." This learned age will not relish the idea of going to school again, and returning to masters whose fame is exploded. Human vanity has been attacked in one volume, national vanity in another. In a word, he cannot expect to find his book appreciated in an age when the nomenclature of plants and facts of natural history occupy the attention of the learned, and "the foppery of modern languages and foreign wit" are reckoned the chief accomplishments. He has lifted up his testimony however, he has left his memorial behind him, a memorial by which it may be known that true taste and knowledge were not wholly lost. His averment is—and with this he closes his preface—"that there is no example of any man who truly understood the ancient learning and did not prefer it to every other." Thus speaks this sturdy old champion of a past age, whom all the classic poetry and prose, the exclusively classical teaching, the strictly classical architecture of the eighteenth century, failed to satisfy. It is well for his own peace of mind that he did not live to make the acquaintance of revised codes and technical education.

The theory given by Monboddo of the origin of language is one which is still strongly maintained by such modern writers as reject the idea of a divine gift of speech. It has been called by Max-Müller the "bow wow" theory, because it starts man with a mere animal cry like that of a dog, from which language has been developed. The most recent work on this subject seems to be that of Professor Key, a criticism of which will be found in the *Westminster Review* for October of last year. The opinions maintained by that periodical are very similar to those of Monboddo. But more modern authorities have eclipsed the old Judge.

The ground gone over by Lord Monboddo in his "Ancient Metaphysics" is very considerable, and this in spite of the fact

that he goes over a great deal of it more than once. Amongst other subjects the history of man, which to a limited extent is taken up in the "Origin of Language," is treated in a more systematic manner. This gives the author scope for advancing many pet theories and views regarding the original state of the human race. Here he begins with an analysis of man's system, making a three-fold division of that system, viz., the vegetable, the animal, and the intellectual. After passing through the vegetable stage man is found elevated to that of animal life, but still destitute of intellect, which is developed afterwards by slow degrees. In the natural or savage state intellect was dormant, man was a mere animal "without clothes, houses, the use of fire, or even speech. The general custom was to go naked even in cold climates. In this state of nature there was as little necessity for the protection of houses as of clothes. As for the use of fire, the memory of its introduction is still retained in the fable of Prometheus, and amongst such a race as the ourangoutans it has not even yet been introduced. Man is naturally not a biped but a quadruped. The upright posture which he now enjoys is the result of habit. Children go upon all-fours, and would continue to do so were it not for imitation and instruction. But to walk upright was so obvious an advantage that it was amongst the first habits acquired by man. Even the backward ourangoutan, fireless and speechless, knows the use of his legs. But although we have gained in learning to walk upright, Monboddo is by no means so sure of the advantages derived from houses, clothes, and the use of fire. He has a thorough sympathy with vagrants. It is only reasonable to find one's happiness in the open air and to shun the confinement of a house. "Nothing is more unnatural to man than the life of a bug, that is a life of closeness and warmth." It is therefore foolish and cruel to force savages abroad or beggars at home to conform to civilized customs. Talking of clothes he says,—"The next remove from the air on which Virgil says we feed was a greater remove still, and such as cannot be justified by the example of any brute, I mean the invention of clothes, by which we carry about with us a house very much closer than any other house." To obviate the "mischief of clothing we must wear as few as possible, enjoy a state of nudity as much as possible, and make a point of frequently bathing. As regards this last piece of advice public opinion has come round to that of the author, but doubtless in 1784 it seemed strange enough. As for fire, it diminishes the natural heat of the body, checks digestion and perspiration, and debilitates the whole system. "Not being a good thing in itself, we cannot suppose that nature would prompt any animal to the use of it."

He makes, of course, a great point of the age attained by man in early times, according to the testimony of both sacred and profane writers. In the gigantic size of primæval man he is an implicit believer. From the "man of nature," as he calls the ourangoutan,

we may still gain some idea of the original size. The testimony of both ancient and modern travellers establish the existence of tall races of savages. Modern pigmies could never have erected such a work as Stonehenge, and in the existence of that and similar ancient monuments we have another proof of this fact. General luxury—imprudent food—the use of intoxicating liquor—in addition to the evils of houses and clothes, have resulted in a general deterioration of the race. Not only in physical strength and in size is the savage superior to the civilized man, he has also the advantage in natural strength and firmness of mind and in sagacity.

The most curious chapter in the whole book is that which deals with the several varieties of the human species. First there are the men with tails, although he knows many will decline to believe in them, "because they think the addition of a tail to the human form would be a disgrace to human nature." Then there is a race somewhere in India who are born with one leg much bigger than the other. Of this variety, not countenanced by any classical writer, Monboddo is doubtful. But he is disposed to believe, upon the authority of an Esquimaux girl, that there is a whole race of one-legged men. For the existence of a people whose eyes were in the breast, being destitute of heads, he quotes a Bishop and Church Father. But in his own opinion the most extraordinary variety is to be found in the mermaids. He has a large collection of testimonies, some curious enough, to support his belief in their existence. That they were to be found as late as the year 1720 he thinks proved. The non-existence in his own day of the other varieties mentioned is no proof that they never existed. There may be extinct races of men as well as of animals. "Man is the most various animal which God has made, so far at least as we know." But although believing in these varieties and in the progress of man from a condition closely resembling that of the brute, he has not hit, it will be seen, upon the more modern theory of evolution. Man has all along been a distinct animal—the ape may be a variety of the race, but he is not the link between us and some less perfect form of animal life.

The whole subject of the origin of language is treated of in this work. To Egypt we are not only indebted for its invention, but also for many of the arts and sciences which distinguish civilized from savage life. Whence had Egypt all this knowledge? Here a supernatural element is introduced. In those gods who, according to the ancient Egyptian traditions, were their kings, he thinks he sees a race of beings superior to men; he is convinced "that all the arts and sciences invented in Egypt derive their origin from those dæmon kings." He now calls in the aid of Scripture, and sees in the story of the sons of God a confirmation of his theory of dæmons. But here we must close our imperfect account of this curious work. If Monboddo gave offence to some, there were others who saw in his



books nothing but what was admirable. Some wrote to supply him with facts bearing out his theories, others to express their sympathy and approval. In one letter preserved at Monboddo, the writer describes him as the great honour of the Scotch Courts of Judicature—the great ornament of the Scottish nation—the excellent—the all-accomplished. A certain Marquis Valady writes to say that he has given up his ordinary walks that he might read his Lordship's works, and speaks of them in almost a tone of adoration.

As an author, Monboddo's great fault lay in a disposition to extreme and unreasonable advocacy of his own views. This of course led him to talk unfairly of those who differed from him. Having espoused the cause of the ancient as against the modern world, he could see no fault in the former, no merit in the latter. Writing to Mr. Harris, a great friend, who, in his opinion, had by his work "*Hermes*" taught philosophy to speak English, he says—"The language which Mr. Locke has put into her mouth is mere stammering, and is in my opinion as contemptible as the matter which he has made her utter. Mr. Hobbes I am not so well acquainted with, but as he is of the same heresy, that is, one of those who pretend to philosophise without the assistance of the ancients, I suppose he has succeeded as ill." Johnson was right when, talking of Monboddo, he said, "What strange narrowness of mind is that, to think the things we have not known are better than the things which we have known." Then one cannot help seeing that he goes out of his way to introduce a paradox, and loves to startle his readers by doing so. Some passages in his works resemble the clever satire of Swift, and it is difficult to believe that the author is not in a humorous mood, just experimenting upon the credulity of his readers. Monboddo has gained a certain reputation by his paradoxes; yet the real learning and solid material which his works contain may have suffered. But, as we have already said, he has not been consigned to oblivion, and that is always something.

W. G. S. M.

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## JUDICIAL STATISTICS 1873.

### ARTICLE SECOND,—COURT OF SESSION.

SINCE this Statutory Censorship of the administration of justice in Scotland has come into operation, we have readily given space to critical reviews of these annual expositions. We have done this because such statistics are eminently useful, if not indispensable, to the jurist. They form the Juridical Barometer, showing the various states of the judicial atmosphere, and detecting any unsteady or unwonted changes in its equilibrium, so that any great deflection may attract the attention of the public and the legislature, and so discover at once the cause and most probable remedy. We have

freely criticised these annual compilations, and are glad to discover that our animadversions have not been wholly without fruit. Our main complaint, however, still in some degree remains. There is an overstraining for figures, which, when obtained at great expense and trouble, unremunerated to the chief labourers, the question remains, *Cui bono?* One half of the figures bearing on the salient movements of the judicial machine might satisfy every possible need, and gratify the most ardent and morbid curiosity.

In our November number for 1872 (p. 573) we dealt with the Statistics of the Court of Session for 1871. In the number for February last (p. 66) we did the same for the Statistics of 1872. Now we resume our task for 1873, having before us the large and forbidding blue book, being the Sixth Report, dated 18th July 1874. The first portion, treating of the departments of police and prisons, we analysed in our number for October last (p. 516).

The first table which presents itself under the department of the Supreme Court is the "Comparative Table of the business of the Outer House for three years" (p. 68). We extract the following results, referring those who desire to carry the retrospect further to our previous articles, where they will find the results given of former years. The present table gives first

Number of causes within the years	1871.	1872.	1873.
1. In dependence at commencement	589	529	546
2. Causes initiated within the years	947	1254	1321
To this table there is uniformly attached mysterious notes—			
First, of causes transferred from one Lord			
Ordinary to another	18	...	17
Second, <i>deduct</i> causes transferred from one			
Lord Ordinary to another	109	133	80

It will thus be seen that the transferred causes appear twice, first *plus* as an addition to the aggregate, and next *minus* as a deduction, yet the figures are, in these two aspects, strangely and greatly different. It is not apparent how the transference of a cause from one Lord Ordinary to another by any possibility, whether added or subtracted, can in any way influence the "Net total causes brought before the Court," but which, according to this table, it is made greatly to affect. A similar result is afterwards brought out (p. 57), where causes transferred from one Division of the Inner House to the other is made, in like manner, to influence the general result of the total number of causes in the Inner House.

The next division of this table (p. 68) gives the disposal of the causes, thus—

	1871.	1872.	1873.
1. Final judgments within the year	725	829	1091
2. Causes <i>otherwise</i> taken out of Court	259	275	222
3. In dependence at the end of the year	461	546	482

These figures evidence the uniform and satisfactory working of the Court in these years; the remanets bearing a uniform ratio to the causes instituted and decided within the year.

We pass over the third section, which consists in stating the "*character* (?) of causes ended by final judgment" (meaning, by character, whether introduced by summons, petition or writ), as being of no practical avail, but which must occasion no small trouble to the collectors of these fanciful divisions. The fourth section gives the result of final judgments, thus:—

	1871.	1872.	1873.
1. For pursuer or other <i>promoter</i> (?) . . .	553	621	760
2. For defender or respondent . . .	150	180	247
3. Mixed judgments . . .	22	28	84
4. On procedure <i>with</i> closed records . . .	331	368	509
5. On procedure <i>not</i> requiring such . . .	394	461	582

The great majority of judgments for the pursuer cannot be set down as arising from encouragement to the customers, but that the pursuers are generally fortified by opinions of right. It is supposed, however, that decrees in absence and in default are included in the number set down as "*final judgments*," and under procedure not requiring closed records. If so, it might have been well that such were separately stated, as these can scarcely be brought under the category of "*final judgments*."

The fifth division deals with costs in cases ended by final judgment.

	1871.	1872.	1873.
1. With costs to pursuer . . .	434	478	561
2. Without costs to pursuer . . .	106	112	175
3. With costs to defender . . .	108	124	157
4. Without costs to defender . . .	40	53	79
5. With costs from common fund . . .	13	28	25
6. Costs otherwise disposed of . . .	24	34	94

"The *nature* (?) of final judgments" is not at all favourable to jury trial in the Outer House.

	1871.	1872.	1873.
1. Final judgments on verdicts of jury . . .	12	10	24
2. " not on such . . .	713	819	1067
3. Verdicts for pursuer . . .	8	7	15
4. " for defenders . . .	4	3	8
5. Mixed verdicts . . .	...	...	1

Similar results are found applicable to the Inner House for 1873 (p. 4). Whilst 500 final judgments were given, only 14 were on verdicts, and of these 11 were for pursuers and 3 for defenders.

There follows a variety of most microscopic tables, the preparation of which must have cost an amount of labour, but with little

profit. One table shows that the patriarch of the depending causes entered the portals of justice in 1830. It is gratifying to find that so few remain in vitality of the crop of the last four years, there being under these years

	1869.	1870.	1871.	1872.
only left, . . . . .	10	20	63	423

and 29 are all that remain of previous vintages, including the fossilized vestige of 1830. We observe a note attached to a case set down as having had its origin in 1857, that the Clerk had given an erroneous date for its nativity in the former year—a matter involving no very serious consequences certainly. There is a section showing the number of “causes transferred from one Court to another.” In ignorance we had hitherto thought that the Lord Ordinaries were all Judges in one and the same Court. We are next presented with the division of the cases amongst the mystic “office marks of Court,” and their initiation, whether by “summons, petition, or writ.” An analysis gives the most minute products of litigation in every possible phase of the forensic kaleidoscope, but which, we opine, few who are not weary of life will attempt to peruse. In like manner there is a table stating the length of time between closing records and final judgments, extending from one week to 292 weeks. There is still kept the nowise instructive column of the “number of *pleadings and other documents* exclusive of productions given in by parties.” This tabulates no less than 1052 of this heterogeneous and mysterious mass of “pleadings and other documents” given in to the Lord Ordinaries. On page 72, in evidence of the excess of zeal, there will be found a table with eight columns, prepared to receive contributions, of which three are total blanks, and the remaining five only yield six numerals. In like manner, on page 70, a table of twelve columns can only claim tenants for three of its cells. We travel through many such arid wastes until we reach a refreshing oasis in a table showing the results of the judgments of the Lord Ordinaries as reviewed by the Inner House. These are given for 1873 under these heads:—

	Adhered to.	Repeated on different grounds.	Reversed.	Partially both.
Lord Kinloch, . . .	...	...	...	1
Lord Jerviswoode, .	8	...	4	...
Lord Ormidale, . .	29	1	7	2
Lord Barcaple, . .	1	...	...	...
Lord Mure, . . . .	16	1	2	4
Lord Gifford, . . .	23	4	8	1
Lord Mackenzie, . .	19	...	5	3
Lord Shand, . . . .	17	2	5	3

Within the year two causes were decided under section 60 of the Court of Session Act 1868, none under sections 59, and none on the opinions of the whole Judges. 26 appeals under the Registration Act were heard and decided by the Judges appointed for that department.

The work of the two Divisions of the Inner House are much more succinctly, and therefore satisfactorily, dealt with in small space. In the First Division 299 judgments were given within the year, and 216 in the Second Division, making in all 500 final judgments. 126 cases were withdrawn from the Inner House before judgment was given. Of the 500 judgments, 298 were for the pursuer, but only 121 with costs, while 167 were without costs, and the remaining ten were otherwise dealt with. 160 judgments were given for defender, 128 with and 27 without costs, and 5 otherwise disposed of. 42 were mixed judgments. The great discrepancy in awarding costs as between the two parties is matter of remark. The results of appeals from the Lord Ordinaries are reported to stand for the year 1873 thus:—Of 203 judgments appealed, 112 were affirmed, 8 repeated on different grounds, 31 reversed and 14 partially in both ways.

The statistics of the Court of Session are closed (p. 76) with an empty scroll of Election Petitions, with the negative result of neither Judge nor cause; of *Cessiones* there are only two, filling up a portion of a large page; to the Poors Roll only 4 were admitted during the year 1873. It would be of some value to know how many applicants for the green table had been rejected as having no *probabilis causa*.

We have thus again endeavoured to filterize this huge mass of figures, and extract the more important points, with the increased hope that, without any diminution of their value, but entirely in the opposite direction, the tables may in future be greatly reduced and simplified in the future under the learned and able direction of the gentleman to whom the work has been judiciously intrusted.

In a future number we shall deal with the Local Courts.

H. B.

## THE FIDUCIARY RELATIONS OF DIRECTORS.

THE wide extension of the mercantile transactions of English capitalists, as well as the variety of the objects in which their money is invested, might be expected to colour more or less the proceedings of our courts of law and equity. And such is the fact. A glance through the Law Reports issued during any single quarter of the year will give some indication, though slight, of the magnitude and complexity of the interests involved in such transactions. Some of the profoundest Judges who have sat on the Bench have

been engaged in the task of building up and moulding into a just and harmonious whole the rules and principles recognised as the commercial law of this country. Of the law thus introduced we purpose examining in detail some few principles which have occupied the attention of our courts of late, and have consequently been more or less topics of general interest. The topics to which we mean to direct our remarks are incidental to a consideration of the law affecting joint-stock companies, yet we venture to hope that in their application they will prove of wider utility. They are:

- I. The Fiduciary Relations of Directors.
- II. Personal Liability of Directors.
- III. Law of Contributories.

"Directors," says Sir John Romilly, in *The York and North Midland Railway Company v. Hudson* (16 Beav. 485), "are persons selected to manage the affairs of the company for the benefit of the shareholders. It is an office of trust, which if they undertake it is their duty to perform fully and entirely." This case, which was decided in 1853, is quoted as containing a fair summary of the duties of a director. A railway company was formed in 1836, with the defendant as chairman. In this position he exercised an uncontrolled authority in managing the affairs of the company, without interference on the part of the other directors. In 1845 the company took steps to extend the operation of their railway, and to that end required an additional capital of one million and a quarter. The undisposed-of residue of shares, 12,050 in number, were carried in the share register book to the name of the defendant, but no sanction was given by the directors to a disposal of those shares. The defendant, however, sold more than 5000 of the shares thus entered at premiums of from £10 to £18 per share. It should be stated that a resolution had been passed at a general meeting of the railway company, placing the 12,050 shares at the disposal of the directors. The company's bill sought relief with respect to those shares exceeding 5000 in number. Storey's Agency (7th edit. p. 249) states it as a general rule that wherever a person is either actually or constructively an agent for some one else, all profits and advantages made by him in the business beyond his ordinary compensation are made for the benefit of the principal. This rule has every reason for its support, and the same may be said of the following observations of the Master of the Rolls in the present case: "A resolution by shareholders that shares or any other species of property shall be at the disposal of directors, is a resolution that it shall be at the disposal of trustees; in other words, that the persons intrusted with that property shall dispose of it, within the scope of the functions delegated to them, in the manner best suited to benefit their *cestui que trust*." This enunciation of a principle of equity makes the result of the bill evident. The defendant was declared

to be a trustee, and bound to account to the plaintiffs for all profits derived from the sale and disposal of the shares. Once establish the relation of trustee and *cestui que trust* and the result is obvious. The rules of the civil law were equally strict with respect to one in the position of a trustee. *Tutor rem pupilli emere non potest. Idemque porrigendum est ad similia, id est, ad curatores procuratores, et qui negotia aliena gerunt.* The above principles, acted upon in the case of *The York and North Midland Railway Company v. Hudson*, are firmly established in the Court of Chancery. "I would not," said Lord Hatherley (L. Rep. 6, Ch. 570), "be supposed for one moment to throw out a word that could tend to lead any trustee into the notion that he may deal with the persons for whom he is trustee, or for whom he is a trustee with others, in any manner which will give him a benefit or put money into his own pocket." Doubtless our readers need not be reminded of the 81st section of the 24 & 25 Vict. c. 96, which makes any fraudulent appropriation of the property of the company a misdemeanor.

With the above decision in view, now let us turn to a more recent case, viz., that of *The Liquidators of the Imperial Mercantile Credit Association* (apps.) v. *Coleman and Knight* (resps.) (L. Rep. 6 H. of L. 189; 29 L. T. Rep. N. S. 1), which was an appeal against a decision of Vice-Chancellor Hatherley, who had reversed a previous decision of Vice-Chancellor Malins. The respondents were stockbrokers in partnership. In 1864 the London, Chatham, and Dover Railway Company was desirous of raising money on debentures and shares, and Peto and Co., who had an interest in the affair, communicated with the respondents on the subject. Coleman wrote to Peto, "If the following arrangement meet with your approval we should like to proceed at once with the affair. I can arrange to place the whole of the B shares and the debentures for a commission of 5 per cent. in cash and 5 per cent. in A shares, to be paid as and when the deposits are paid into the company's bankers." Peto replied to express his firm's consent to the above. In the same year was incorporated a company called The Imperial Finance Company (Limited). Coleman was a director. It was agreed that this company should unite with another called The Mercantile Credit Association (Limited). Coleman became a director of the united company, but he was not one of the first committee. A proposal was now made to the committee by Knight and Coleman suggesting that the company should undertake to "place" the debentures above referred to at a commission of one-and-a-half per cent. No mention was made of the previous arrangement with Peto and Co. The proposal was adopted. The question for the decision of the court was whether Coleman was liable to account to the association for the difference between the two amounts of commission so far as concerned the debentures which had been actually placed by the association. One of the articles of association provided that a director should vacate his office (1)



If he held any other place of profit under the company; (2) if he became bankrupt or insolvent; (3) if he was concerned in the profits of any contract with the company without declaring his interest at the meeting of directors. The above question was answered in the affirmative. Coleman did not declare *his* interest. This was most material, for, as Lord Cairns observed, the conduct of the shareholders might have been very different had they known the real nature of the transactions. In this case it is recognized as a "firmly and well-established principle" that a person holding a fiduciary position with reference to a company cannot obtain for himself a benefit derived from the money of the company. The law being so laid down, probably no attempt would be again made to exonerate directors from the liability of trustees. To do so would be labour thrown away. The attempt would rather be made, as in this case, to prove that the rule did not apply because the person was not director, as alleged. Before we leave the subject, it may be useful to run briefly over some few cases which bear upon the topic discussed. That of *The Great Luxembourg Railway Company v. Sir William Magnay* (25 Beav. 586) came before the Master of the Rolls in 1858. Magnay was the chairman of the board of directors. In 1853 the company furnished him with a sum of money to enable him to purchase the "concession" of another line. He purchased it, but, as it afterwards appeared, he was himself the owner. The Master of the Rolls recognised the fiduciary character of the director, and was prevented from giving relief only by the fact that the plaintiffs had rendered it impossible. An earlier case is that of *Benson v. Heathorn* (1 Y. & C. Ch. 326), decided by Vice-Chancellor Bruce in 1842. The plaintiffs in this case had combined with others in forming a company for the purpose of carrying goods and passengers along the coast of Brazil and elsewhere, and for the building, purchase, and hiring of steam vessels. The defendant, one of the first directors, purchased a vessel for £1340, and afterwards sold it to the company, as from a stranger for £1500. He charged the company, in addition, a commission at £1 per cent. The bill was filed to obtain relief against this and other acts. "I apprehend," says his Honour, "that without any special provision for the purpose, it was by law an implied and inherent term in the engagement that they [the directors] should not take any other profit to themselves of that trust or employment, and should not acquire to themselves while they remained directors, an interest adverse to their duty." We now come to the important case of *The Aberdeen Railway Company (apps.) v. Blackie Brothers* (resps.) (1 Macq. Sc. Ap. 461). Messrs. Blackie, ironfounders, in Aberdeen, brought an action against the railway company for performance of a contract to purchase and accept some iron chairs from Messrs. Blackie. The defence relied on was that at the time of making the contract, Mr. Thomas Blackie, the managing partner of the Ironfounder's Company, was a director of the railway company,

and therefore incapacitated from dealing in that character with his own firm. The Court of Session held that the Companies' Clauses Consolidation Act (8 Vict. c. 17. ss. 88, 89), did not make the contract void, although it deprived the contractor of his office. The decision was accordingly given in favour of Blackie. The railway company now appealed. It was contended for the respondents that the contract was not null; that, in fact, the question now before the House of Lords had already been solved by the Court of Common Pleas in *Foster v. The Oxford, Worcester, and Wolverhampton Railway Company* (13 C. B. Rep. 210), and that the appellants were concluded by acquiescence. For the appellants, the Solicitor-General (Sir R. Bethell), contended that Blackie was a trustee, that the general law applicable to all fiduciary relations prevented him from making a valid contract in the business of the company for his own benefit; a rule determined in 1795 in *The York Buildings Company v. Mackenzie* (8 Bro. Par. Cas. 42), that these views are supported by *dicta* of Lord Eldon; that the construction of the statute as made by the court below sets a premium on the commission of a breach of trust, and facilitates a violation of duty, and, finally, that no acquiescence could give validity to such a contract; as to the case of *Foster*, on which reliance is placed, the court was constrained to act as it did owing to its incompetency to take fiduciary principles into consideration. In delivering judgment the Lord Chancellor Cranworth first considered the subject without regard to the statute, and proceeded to touch upon the position of directors with regard to the company. His Lordship recognised the fiduciary nature of the duties of directors (16 Beav. 485), and gave expression to a rule of universal application, to the effect that persons entrusted with duties of such a nature shall not be permitted to enter into engagements in which they may have a personal interest which may possibly conflict with the interests of those whom they are bound to protect. The fairness or unfairness of such an engagement is quite immaterial, and this is an inflexible rule, acted upon by Lord King, Lord Hardwicke, and Lord Eldon. Further, this prohibition does not depend on the subject-matter of the contract, "but on the fiduciary character of the contracting party." Thus, any objection that previous questions had arisen, not on mercantile transactions, but on agreements for purchases of land, and contracts of a similar nature, was disposed of. Having settled these principles, his Lordship held that Blackie contracted on behalf of those for whom he was acting with himself. Lord Fullerton had previously expressed a doubt whether the rule would apply where the party is only one of a body of directors, and not sole manager. The Lord Chancellor, however, thought this distinction of no moment, and maintained further, that unless the respondents could show that the Companies' Clauses Act made valid a contract which was bad on general principles the case of *Foster* would not serve them,

We have now gone through some of the more important cases

bearing upon the fiduciary character of directors; we have attempted to show how the law has been settled so as to check any fraud or fraudulent use of their position by directors; and how, as in the case last noticed, the enlightened principles of the civil law have been infused with beneficial effect into the system of our mercantile law. Courts of equity cannot allow to persons in fiduciary relations the powers enjoyed by strangers. A position of trust is a position of power; it enables an unscrupulous person to do much wrong; to others it is a position of trial and temptation. Besides, breaches of trust are hard to detect, and often irremediable in their consequences, hence the extreme jealousy of the Courts of Chancery of the interests of the *cestuis que trusts*. Our remarks may be fittingly closed by some observations made by Lord Eldon upon the leading case of *Fox v. Mackereth*: "Though you may see in a particular case that the trustee has not made advantage, it is utterly impossible to examine, upon satisfactory evidence in the power of the court (by which I mean the power of the parties) in ninety-nine cases out of a hundred, whether he has made advantage or not. Suppose a trustee buys an estate, and by the knowledge so acquired in that character discovers a valuable coal mine under it, and locking that up in his own breast, enters into a contract with the *cestui que trust*; if he chooses to deny it, how can the court try that against that denial? The probability is, that a trustee who has once conceived such a purpose will never disclose it, and the *cestui que trust* will be effectually defrauded." (*Ex parte Lacey*, 6 Ves. 627.)—*Law Times*.

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### THE REMANENT JURISDICTION OF THE COURT OF CHANCERY IN ENGLAND.

ALTHOUGH the English Judicature Act of 1873 was in itself a great step towards the ultimate fusion of law and equity, whether regarded as systems of administering justice or as systems of justice to be administered, it will not have the immediate effect of reconciling legal principles which were matured in mutual antagonism, and which to a great extent will continue to be administered by separate tribunals. It is no doubt true, for instance, that the main features of difference between the practice and pleadings of the Law and Equity Courts respectively have been removed by the Act. Thus, in an action for damages in the Queen's Bench division, the Judge will have as large a power of permitting discovery by both parties through interrogatories, or of ordering the production of documents, as can be exercised on the Chancery side of the court; and not only is he specially directed to take notice of all equitable interests and give effect to all equitable defences, but whatever the

subject-matter of the action may be, the writ of summons (as provided by the rules of procedure scheduled to the Act) may be endorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action. The Common Law Judge may even grant injunctions and appoint receivers, he may amend the pleadings and join new parties, so that all the inconvenience and practical injustice of the old and inelastic forms of writ (which had been previously mitigated by measures of compromise) may now be said to be for ever impossible. On the other hand, the pernicious and ridiculous system of taking evidence wholly, and in large quantities, by means of affidavit (a system not redeemed by the possibility of cross-examination before the official examiner), is entirely destroyed by the vigorous 36th Rule scheduled to the Act, which provides that in the absence "of any agreement between the parties, and subject to any rules of court applicable to any particular class of cases," the witnesses at the trial of any cause or any assessment of damages shall be examined *viva voce* and in open court. This was an indispensable reform, and has removed the greatest blot from Chancery practice. Only those who have had some experience of the process can understand how costs were multiplied, litigation delayed, perjury and rash swearing encouraged, and the whole issues involved in a cloud of contradictions by this system of affidavits. The worthlessness of the statements themselves, generally made without cross-examination, led naturally to their being increased in number in order that the judge might be impressed by the bulk of evidence adduced. A great Chancery suit thus became a contest of purses, and the judge was asked to decide upon these unsifted and often unintelligible depositions without seeing a single witness in the cause. Students of Bentham will remember how unsparingly he attacked the continental system of *Juges informateurs*, which then obtained in the Admiralty and Ecclesiastical Courts of England, and which he entirely attributes to the love of ease and dignity of the bench. The Chancery system was rather worse, because *viva voce* examination was the rule, not the exception, before the *Juge Informateur*. It used to be said of Equity attorneys that they kept an *informing* and a *believing* clerk; the first repeated the necessary affidavits to the second, who then wrote down that "he was informed and believed," &c. &c. Affidavits are indeed still retained for evidence upon interlocutory applications, where chiefly formal matters require proof, and of particular facts which the Judge may admit to proof in that way, but even in these cases they are to be rigidly confined to matters within the deponent's knowledge, and the cost of an affidavit containing hearsay, quotation or inference falls upon the party filing the same. Even in these cases it is proposed to reserve a right to have particular witnesses cross-examined before the court. The simple form of summons which is to be provided by the rules, and the power of the Chancery judge to order an

issue, will put a severe but wholesome check on the extravagant luxuriance which still disfigures much of Equity pleading.<sup>1</sup> While, however, this exchange of advantages in procedure has taken place, and the appeal jurisdiction in both Equity and Common Law has been vested in the same court, it will have been observed that the Chancery division of the High Court retains a very large proportion of the business previously belonging to itself. This consists of (1) matters appropriated to the Court of Chancery by Act of Parliament; (2) the administration of the estates of deceased persons; (3) the dissolution of partnerships and the taking of partnership accounts; (4) the redemption or foreclosure of mortgages; (5) the raising of portions or other charges on land; (6) the sale and distribution of the proceeds of property subject to any lien or charge; (7) the execution of trusts charitable or private; (8) the rectification or setting aside or cancellation of deeds, or other written instruments; (9) the specific performance of contracts between vendors and purchasers of real estates, including contracts for leases; (10) the partition or (?) sale of real estates; (11) the wardship of infants and the care of their estates. In the same way the divisions of the Queen's Bench, Common Pleas, and Exchequer, retain the business of which, as separate courts, they had exclusive cognizance, the Bankruptcy Court being thrown into the Exchequer division, and the Admiralty Court, and that singular tribunal over which Sir James Hannen presides with such efficiency, being thrown into a separate division. 1. It is obvious, that so far as the great equitable doctrines applicable to the law of trusts, specific performance, etc., have been constructed in opposition to or in evasion of the common law, they will continue to be administered, and to be further elaborated in the Chancery division, without coming more closely than heretofore under the influence of the common law. It becomes therefore an interesting question at the present time, whether the privative jurisdiction vested by the Act in the Chancery division embraces all those matters in which the Court of Chancery did more than correct the shortcomings of her elder sister, softening her rigour and aiding her process, and in which the Equity judges applied principles of justice without regard to the teaching of the common law, because on these matters the common law was silent. We shall consider separately the several branches mentioned in the 34th section. In doing so we must leave out of consideration the innumerable matters, some of great

<sup>1</sup> Although draft rules under the Act have been prepared by Sir W. Harcourt, they are as yet without authority or force. It must of course be remembered that under 17 & 18 Vict. c. 125, a plaintiff at common law might, "in any action except replevin and ejectment, claim a writ of mandamus ordering the defendant to fulfil any duty," by the non-performance of which the plaintiff was prejudiced, and in action of damages he might obtain an injunction against a repetition of the injurious act. Under the same statute pleas and replications, which, if pleaded in Equity, would afford unconditional relief, might be given effect to at common law. So also by the Chancery Amendment Act 1858, an Equity Judge might award damages and try certain cases by jury.

importance, the jurisdiction in regard to which has been vested in the Court of Chancery by statute. Among these may be mentioned the jurisdiction in bankruptcy which, after remaining in a separate court for about twenty years, was recovered by Chancery by the Act 10 & 11 Vict. c. 102; the jurisdiction in questions relating to registered joint-stock companies, conferred by the 81st section of the Companies' Act 1862; and the jurisdiction under 19 & 20 Vict. c. 120, for facilitating leases and sales of settled estates. In the last case, where a sale has been decreed, the Court superintends the application of the purchase price on similar trusts to those on which the lands were held. Under the English Lands Clauses Consolidation Act, all compensation money assessed under Railway, Canal, Dock, or Gas Acts, for which no receipt can be granted, is paid into the Court of Chancery and dealt with there. So also the Trustee Relief Acts (10 & 11 Vict. c. 96, and 12 & 13 Vict. c. 74) authorise monies held on any trust to be paid in and to be administered by the Court. It is a curious piece of history that the jurisdiction in winding-up limited companies, originally given under the Winding-Up Acts 1848-9, was from 1857 to 1862 exercised by the separate Court of Bankruptcy. 2. The suit for administration of the estate of a deceased, testate or intestate, and whether brought by a creditor, legatee, administrator, administrator *de bonis non*, executor or devisee, in trust, or by the person entitled to residue, came somewhat indirectly into Chancery. The creditor was probably attracted by the opportunity of getting paid out of equitable assets which would not have been available in a court of law. The legatee followed the executor from the Ecclesiastical Court, in which the latter often suffered injustice, that court having power only to decree for payment, but not to recover or wind-up the estate. The executor went to Equity for protection against decrees which might involve him in personal liability beyond the assets of the estate, and the legatee gradually acquired the right of calling him there in the first instance. In these two cases, and in the case of a suit for administration by a person entitled to residue, the Court of Chancery is entitled to have its jurisdiction continued chiefly on the ground that, as the executor often denies assets, and there is generally a need of winding up, it has a system of rules and officers at work, an existing machinery for the realization of assets, the calling in of claims, the payment of debts, expenses, and legacies, and the ascertainment of the net residue and the parties entitled to it. According to Lord Hardwicke, the Court of Chancery assumed the responsibility of stopping writs in the Ecclesiastical Courts, because there was a *fiduciary* relation between the executor and legatee (Haddan, p. 6). As the Statute of Limitations does not run against beneficiaries under a constituted trust, it was obviously convenient in many cases to treat the executor as a trustee. Again, real estate was first made liable for simple contract debts of the deceased by a declaration in an Act

of 3 & 4 Will. IV., that it should be taken as equitable assets, and therefore the subject of administration. But this system of judicial accounting is extensively resorted to even when there is no real litigation. The trustees or executors wish for speedy exoneration; and in these cases the Court acts more in an administrative than in a judicial capacity. The English law relating to the interpretation of wills is eminently reasonable. It aims at truly discovering the testator's intention from the language of his will; and in those cases, where the testator had obviously no intention with regard to the events which have arisen, or has failed to express it, it frankly admits the necessity of supplying or constructing an intention for him: a process carried on according to certain fixed rules of construction, which again are based ultimately on an experience of what is usually or commonly provided by testators in such events. 3. The dissolution of partnerships, and the taking of partnership and other accounts, form substantially another department of the accounting business of the Court. There was originally at Common Law a writ of account for money received at the instance of one partner against another, and more lately an action of covenant where partnership articles had been entered into under seal. Justice frequently required, however, that a general investigation of accounts should take place, and this the Common Law Courts, even with the help of referees, arbitrators and statutory auditors, could not satisfactorily accomplish. Besides affording the means of arriving at a neutral balance-sheet, and deciding all questions of indemnity, etc., between the parties, the Chancery Court assumed two great powers, *1st*, of decreeing a dissolution in the case of gross misconduct or supervening incapacity, and *2nd*, of appointing a receiver with a view to dissolution, although it will not appoint a receiver to carry on the concern because disputes have occurred. Equity will order an account, not only where there is a partnership, but wherever there are mutual accounts between the parties. This is entirely distinct from the case of set-off, in which Equity did not interfere, as has sometimes been supposed, except where one of the debts, *e.g.* an assigned chose in action, was one which could not be recognised at common law at all. Another very important matter in which Equity decrees an account is on a bill by a principal against his agent. The origin of this procedure no doubt lay in the immense difficulty of supporting a case at common law by evidence, especially when not only interested parties, but the litigants themselves, were excluded from Court. By administering interrogatories in Equity, however, the dumb plaintiff or defendant could be made to speak, although his whole deposition had to be read as one admission. The difficulty of proving a case must have been especially great where a dishonest agent concealed everything from his principal. *3rd*, Bills to foreclose and to redeem mortgages naturally belong to Equity, as Equity created the "equity of redemption," and the satis-

faction of debts in bonds under penalty by payment of principal, interest and costs. It also created the equitable mortgage by deposit of title. The powers of the Court in sales of mortgage estates are chiefly exercised under the Statute 15 & 16 Vict. c. 86, but the large powers conferred on mortgages by Lord Cranworth's Act 23 & 24 Vict. c. 145, to sell on six months' requisition, must have to some extent made proceedings in Chancery unnecessary where no question arises as to priority of incumbrance, or as to the precise balances due on the mortgage account. In bills to redeem there is frequently a marshalling of the securities affecting the estate carried out under the supervision of the Court. The absence (except in two counties) of any system of compulsory registration, either of title or of incumbrance, raises many nice questions as to the *bona fides* of, and the notice, actual or constructive, given to, second incumbrancers. Judgment creditors, who are in possession under a writ of *elegit*, can obtain authority to sell under the provisions of 27 & 28 Vict. c. 112. With regard to foreclosure suits it may be observed that the county courts possess an equitable jurisdiction in the case of mortgages not exceeding in value £500. It would rather appear however from the terms of the 34th section of the Judicature Act, that appeals in such cases from county courts will not lie to the Chancery Division. Every one knows that it was in questions between mortgagors and mortgagees, and between creditors and debtors under bond, that Equity first applied the rules of conscience, which, although they have been described as not logically justifiable from the letter of contract, really gave effect to what was the substantial intention of parties. The common law declared an absolute fee to vest in the mortgagee whenever the day or hour stipulated for repayment had passed, or in the case of a bond, that the penalty was due. Equity recognising that the form of the transaction was one not wholly selected by the parties, but in part dictated by the laws in restraint of the trade in money, declared that not even an express agreement would bar the equity of redemption. 4 and 5. "The raising of portions and other charges on land" applies chiefly to the case where lands have been devised to trustees for a term of years to pay certain portions to the children of a marriage, reserving a life interest to the parents, and with remainder to an eldest son. In no department, probably, has a larger number of apparently conflicting decisions been pronounced by Equity Judges. This is inevitable from the latitude of the rule laid down with respect to the time when portions are to be raised, viz., when the Court thinks to be most beneficial to those for whom the portions are provided. "The inclination of the Court of Chancery has been against raising portions out of reversionary terms by sale or mortgage in the lifetime of the parent, as leading to a sacrifice of the interests of the person in reversion or remainder. And modern settlements usually contain a prohibitory clause against it" (Story, ii. 198). A good



instance of the audacity of Equity in ignoring the most sacred forms of real property law is to be found in the rule, that where copyhold lands had been devised for payment of debts, and in favour of a wife and younger children, but the will did not contain the necessary surrender to the uses of the will, that a re-grant might be made to the devisee by the lord of the manor, the Court of Equity would interfere and supply the defect. The same course would have been taken if the devise were for charitable purposes within the most violent construction of the Statute of Elizabeth. Another common case, probably intended by the Act to fall under 4 or 5, is where an equitable mortgage of realty is created by the mere deposit of title-deeds. This, however, apparently in opposition to the provision of the Statute of frauds requiring writing to found action on agreements relating to land, has long been settled in Equity, even where no verbal communications have passed. And a legal mortgagee, who has not inquired for the titles, will be postponed to such an equitable mortgagee (Snell, 267). But the equitable mortgagee obviously requires the assistance of the Court to give him a title if he requires to realise. The case of lands charged by a testator with the payment of debt (which has the effect of depriving specialty creditors of their preference) seems rather to fall under the head of administration suits, which include a marshalling of assets and of claims. Trustees under a will charging realty with debts, but making no specific provision for the payment of debts, have now power to sell under section 14 of Lord St. Leonard's Act, 22 & 23 Vict. c. 35, but they are of course very frequently before the Court on other questions. Bills to foreclose pledges of *personal* property are also occasionally brought in Equity; and to them the Court applies the doctrine of "teaching" (*i.e.* of making securities available for subsequent advances), much more freely than to the case of mortgages upon real estate. Of a similar nature is the right of a solicitor, under 23 & 24 Vict. c. 127, to have a lien in his own favour declared over an estate recovered in the suit which has been under his management. 6. The Lord Chancellor still remains the Royal Visitor of colleges and charitable foundations. And the Chancery Division will retain that famous branch of jurisdiction: viz., charitable trusts, in which some of the most eminent Chancellors acquired a perhaps not enviable celebrity. The charitable jurisdiction seems to be undoubtedly older than the Statute of Elizabeth relating to charitable uses, or than the proceeding at the instance of the Attorney-General by information to establish a public charity. The uses recognised by the Court must be analogous to those mentioned in the Statute, viz., relief of poor and sick, education, public works, trade, redemption of prisoners, relief from public burdens, marriage of poor maidens, etc. It is amusing to observe that a gift to found an hospital for curing maladies in animals useful to man has been held to fall within the Act. The Court will not merely manage the property for charitable

uses, if there is a failure of executors, but will supply specific intentions and a particular scheme where the testator has expressed only general intentions. There is also the doctrine of cypres, or "thereabouts," which allows a general charitable intention to be carried out in the discretion of the Court, even when the particular mode specified by the testator has become impossible. Clearer instances than some of these charity cases could not be found, in which the Court, even where there were next of kin claiming the residue, has assumed the authority of Parliament, and disposed of private property according to its own views of public policy. In fact Sir W. Grant frankly said (7 Vesey, 499): "Whenever a testator is disposed to be charitable in *his own* way and on his own principles, we are not to content ourselves with disappointing his intentions, if disapproved by us; but we are to make him charitable in *our* way and on *our* principles." Where only a general purpose is expressed, the charitable scheme is fixed nominally by the authority of the Sovereign's sign manual: as when a "gift to the poor for ever" was handed over to the Blue Coat School, London. Where it is only a failure of definite objects of an expressed trust which occurs, the scheme is adjusted by the Court, unless it is not a contentious or difficult case. The simpler cases of large pecuniary value, and brought in a friendly way for extrication, go before the Charity Commissioners appointed under the Charitable Trusts Acts of 1853, 1855 and 1860; and the small cases, where the annual income is below £50, go to the County Court. Nearly every case of misappropriation of revenue would still come into Chancery. Similar pretensions to those of the Court of Chancery in the case of public charities have been made by the Common Law Courts to punish actions, of which they morally disapproved, by means of the doctrine of conspiracy. As regards private trusts, the historical reason why the jurisdiction in such matters has vested in the Equity Court is of course that, when the Statute of Uses was passed to check the evasion of the old Law of Mortmain by conveyances to private persons to the use of spiritual corporations, the Court of Chancery declined to recognise "a use upon a use;" that is to say, it refused to apply the statute, which identified the legal with the beneficial estate, to the case of a conveyance to A to the use of B in trust for C. Accordingly trust estates became possible, and presented all the advantages of freedom from the restrictions which feudal or statute law imposed on dealing with the legal fee; and English conveyances to this day run "unto and to the use of A in trust for B." It is even said (Blackstone ii. 366) that *sub pœna* from Chancery was the only method by which a tenant in copyhold could enforce a surrender on the lord of the manor, the alienation of a copyhold being held to have only a *jus fiduciarium*. Partly from these historical circumstances, and partly from the facilities which the gradually expanding procedure in Equity gave for taking accounts and eliciting

information otherwise inaccessible, and for obtaining injunctions and orders *in personam*, the Court of Chancery appropriated to itself the whole of trust-law, even suits for legacies having expressly been taken away from the Court of Probate by the Act 20 & 21 Vict. cap. 77. The majority of cases are of course cases of dispute between the various parties interested in the trust, and long before the Trustee Relief Acts were passed, trustees were entitled, where any reasonable doubt of fact or law arose, to pay money into Court, or at least to bring the fund there by a suit for administration, subject to a liability for costs, if the resort to the Court was oppressive or without sufficient cause. Nor is this power confined to express trusts, as an insurance company has been held entitled to pay disputed policy money into Court; and a purchaser would probably be held a trustee for the vendor with respect to unpaid purchase-money. The case in which the Court intervenes to assist trustees in the mere management or administration of the estate have been defined in a number of recent Acts of Parliament. Thus under 13 & 14 Vict. cap. 60, the Court of Chancery may convey the estate of infant trustees, or where a trustee is out of the jurisdiction, or where it is uncertain whether a trustee survives or which trustee did survive, or when a trustee dies without an heir: in all these cases the trust estate may be conveyed by the Court. These powers are generally exercised by the appointment of a person to convey. Under the 32rd section of that Act, the enormous power is given to the Court to appoint new trustees "*where it is inexpedient, difficult, or impracticable to do so without the assistance of the Court;*" a power which is expressly declared by the Trustee Act Extension Act of 1852 to be exercisable whether any trustee exists or not. It would appear that this power is chiefly valuable in connexion with the power of vesting the trust property by order of the Court: for prior to the Act the Court could not merely appoint, but could also discharge and remove a trustee, with a view to the proper execution of the trusts. Under the 30th section, again, of Lord St. Leonard's Act, already referred to, trustees may apply to the Court for its opinion, advice, or direction on any question respecting the management or administration of the trust estate, but not for a decision on a question of title or of the construction of a deed. The powers of sale and investment, and appointment of new trustees without leave of Court, given by the Act of 1861, "for the further amendment of the Law of Property," and by the Trustees and Mortgagees Act (already referred to as Lord Cranworth's Act), no doubt diminish the number of cases in which trustees must make friendly applications to the Court. Probably a more accurate division would place the administration of trust estates under statutory power, and the powers exercised by the Court under the Infant's Settlement Act (18 & 19 Vict. cap. 48) in the statutory jurisdiction of the Court. The benefits of judicial administration of trust property were long

diminished by the absurd rule making investment in £3 *per cent.* bank annuities compulsory, even where the deed of trust gave specific wider powers. Perhaps the most interesting branch of English trust law is that relating to resulting and constructive trusts; the first where from a failure of object the beneficial interest returns to the donor; the second where trust property gets into the hands of a third person, (not being the child of a sole beneficiary), with notice (even constructive) of the trust, or who, if a volunteer (*i.e.* a gratuitous donee), has *bona fide* taken the property with or without notice. Then, with regard to executory trusts (Haddan, p. 208), where a testator has indicated a clear intention, or where the leading purpose of an onerous contract in marriage articles is obvious, but technical directions have been given which will not carry out that intention and purpose, the Court enables the trustees to protect valuable interests by substituting a *strict* settlement for the settlement actually directed, or inserting conditions of vesting or powers of management which they may think necessary. 7. The most common case of rectification of deeds in Equity is that of marriage settlements, which purport to be in pursuance of, and yet substantially vary from, the articles entered into before marriage. This is very easily accomplished without extrinsic evidence where marriage has intervened between the articles and the binding settlement. Where, however, marriage has followed on the erroneous contract, it requires a strong case of mutual error to upset the deed; and in no case is this mercy extended to "volunteers." It is said the maxim of "*ignorantia juris*" does not apply to cases of gross and unaccountable ignorance of the elementary rights of succession. But it will generally be found that in such cases a party to the contract, or a solicitor, has violated some duty of disclosure; and that the victim of error is really not in possession of the facts, or does not know into what facts he should inquire. Of course, where a family have arranged a compromise of differences, the Court is disinclined to interfere, even if facts have been misunderstood and rights unknown. It would be impossible to do more than indicate the numerous circumstances in which, on the ground of actual or constructive fraud, the Court of Chancery has been in the habit of setting aside or cancelling documents at the instance of the deceived party. These grounds of reduction, as they would be called in Scotland, may no doubt all be pleaded now as equitable defences at law, but the advantages of having a fraudulent contract cancelled at once before action is taken by the party relying on it are so obvious, that the Chancery Division will probably long retain this branch of jurisprudence, in which indeed many of its most precise and valuable decisions have been pronounced. The Court has classified under the head of Constructive Fraud many matters which with greater propriety might have been left to stand alone. Thus agreements contrary to public policy, or prohibited without inquiry into good

faith as between persons in very close fiduciary relations; contracts by sailors relating to wages or prize-money; and sales to expectant heirs at extravagant prices, or sales by expectant heirs of reversions in real estate at inadequate prices, are much better described apart, because their unlawfulness does not depend on fraud entering into their constitution, however strong or weak the presumption of fraud may be in particular cases, but on a positive prohibition, grounded chiefly on an extensive, though far from invariable, experience of actual fraud in similar cases. It is the great bane of legal classification to desert the real facts which constitute or take away a right for some fictitious verbal unity. The practice is grossly unscientific, and cannot be recommended even as a useful mnemonic.

8. The principle that specific performance may be enforced of erroneous contracts, not involving personal skill in the execution, where damages at common law are an insufficient remedy, is one very firmly established, and productive on the whole of good. It is confined chiefly to contracts relating to land, or where the subject-matter is not of a fungible nature, but exists in limited quantity or possesses unique excellence. Thus building contracts are never specifically enforced, but sales of articles of *virtu* generally are, and where "it would be *impossible* to assess damages" decree will be given. (There is, of course, a tacit fallacy in this last rule, because if a common-law jury would assess damages, the feat may be described as wonderful, but not impossible. There is certainly no greater impossibility in assessing damages for the loss of the Pusey Horn, than in assessing *solatium* for the loss of a child or a husband.) As regards real estate, the English text-books mix up with this subject a matter which is wholly distinct, viz., the question whether contracts, not reduced to writing under the Statute of Frauds, may not be enforced where there has been *rei interventus*. That is a question of the existence of a contract, not of the Court's discretion to enforce it. Surely specific performance would never be decreed where there was not some alternative claim to damages on breach. It is, however, also a distinct ground for ordering specific performance, that acts of part performance referable to the agreement have taken place, provided the Court would have had jurisdiction, if the contract had been complete without *rei interventus*. In every case, apparently, where a formality, *e.g.*, writing, which is required to make the contract binding, has been omitted through the misrepresentation of one party, the other party will be entitled to specific performance. The English decisions do not very clearly state the difference between the elements of fraud, accident, and mistake, which will go to the setting aside of a contract, and the pleas, similar in nature, by which a defendant may successfully resist specific performance. One would suppose that the right to vary a written contract by parole evidence (which in certain circumstances is conferred upon the defendant in a suit for specific performance) had very little to do with the merits of the question,

whether the Court would interfere or not, except of course by way of formal avoidance of the prayer of the plaintiff's bill, which might be amended. The truth seems to be that, especially where there are cross suits for specific performance, the one party alleging a variation of a written contract, the other relying on what is written, the case becomes one of rectification, and not properly of specific performance, the real question being what is the contract, and the parties generally being ready to perform what they respectively hold to be the contract. If a parole variation be successfully alleged, it would be impossible for the complainant, though he had failed to get specific performance, to sue for damages at law. Misdescription is a very common answer to a suit for performance of a purchase. Lord Eldon says:—"The Court is from time to time approaching nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have" (Snell, p. 457). The Court has laid down no general principle distinguishing the cases where compensation is held to be sufficient from those where performance is decreed. It appears that the interests of third parties are sometimes considered. The right to rescind on breach is also mixed up with this subject in a manner that does not tend to clearness. For the future, however, it may be assumed that if, time not being of the essence of the contract, failure to perform within a time fixed does not protect a defendant in a suit for specific performance, it will not protect him from a claim of damages.

9. The authority of the Lord Chancellor over the persons of infants and their property is delegated to him by the Crown, as *parens patriæ*, not by separate commission, as is the case with regard to idiots and lunatics, but *virtute officii* and under the general commission by which he holds the Seals. It is only to infants possessed of means but destitute of guardians at law that the Court appoints a guardian. It also assists and regulates guardians at law, and will even remove them for misconduct; a rule which is applied to the gross misconduct of the parent. As regards the custody of children the Court of Chancery very sensibly breaks, in extreme cases, the rule that legitimate minor children cannot be removed from the father's custody; neglect of education is a frequent ground of such interference, and in one case insolvency was the ostensible ground. Where the parents live apart, the Court has frequently given a daughter of tender years to the keeping of the mother. Perhaps the most unpopular decisions in the matter have been those where, as in the case of *Newbury*, the particular theology of a deceased father has been held sufficient ground for taking away children from the widow who had changed her faith. But the branch of the law of guardianship in which the Court of Chancery has exhibited the most characteristic vigour and enterprise relates to the marriage of wards. The Court will not

merely interdict a marriage, and all communications between a ward and an admirer; but offers of marriage are referred to chambers, to be reported on, and then to adjust a settlement. Persons marrying wards without leave are guilty of a contempt of Court. Apart from the guardianship of the Court, it has power to deal with real estate vested beneficially in infants under "The Act for consolidating and amending the Law relating to Property belonging to Infants, Feme Coverts, Idiots, Lunatics, and Persons of unsound mind" (1 Will. IV. c. 65).

10. The necessity for a suit of partition arises, or may arise, in three cases:—1. Coparcenary, where land descends to co-heirs; 2. Joint tenancy, where property is limited to two without words of division; 3. Tenancy in common, where property is limited to several with words defining the aliquot shares (Heynes, p. 147). The nature of this right being that each coparcener or tenant had a concurrent right to the possession and enjoyment of the whole subject, and the common law writs of partition, authorized by various statutes, failing to provide for the common case of unequal division and compensation, equity intervened, and with such effect, that in 1833 the writ of partition was abolished, and in 1841 the Court of Chancery received, what it had not previously, power to decree a division of copyhold lands. The division is performed by Commissions appointed by the Court, and mutual conveyances are afterwards executed. A great improvement was effected in the law by The Partition Act 1868, which authorized the Court to direct a sale of the property, instead of a division, where that seems right from the nature of the property, the number of those interested, the absence or disability of certain parties, etc. We shall add here an amusing anecdote from the Western Circuit, which we think has never before been published, and which illustrates in a forcible manner the inconveniences attending on joint tenancy. An attorney and another person possessed a house as joint tenants. The attorney resided in it, and his co-tenant asked him for a rent. The attorney coolly referred to the law relating to joint tenancy, and declined to pay anything. A few days afterwards, on returning from business to dinner, the attorney found his co-tenant in company with a litter of pigs in possession of the drawing-room. The co-tenant politely explained that he was resolved to possess, and that he preferred to keep his pigs upstairs. A rent was immediately offered.

W. C. S.

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## THE PLEADER'S GUIDE.

WE would refer all those who are anxious to have an opportunity of abusing the intricacies of the Law and the dishonesty of lawyers to a mock heroic poem published last century, entitled "The Pleader's Guide: a Didactic Poem in two parts, containing the conduct of a Suit at Law, with the arguments of Counsellor Bother'um and Counsellor Bore'um, in an action betwixt John-a-Gull and John-a-Gudgeon for assault and battery." It purports to be the work of "the late Mr. Surrebutter, Special Pleader and Barrister at Law." (The author was John Anstey, the son of the author of the New Bath Guide.) It is written for the benefit and instruction of his kinsman, Mr. Job Surrebutter, who is described as one of those young gentlemen

"Who for three hundred guineas paid  
To some great Master of the Trade,  
Have, at his rooms, by *special* favour,  
His leave to use their best endeavour,  
By drawing Pleas from nine to four,  
To earn him twice three hundred more ;  
And, after dinner, may repair  
To *foresaid* rooms, and then and there  
Have *foresaid* leave, from five till ten,  
To draw th' *aforesaid* Pleas again."

The opening lecture of the series commences with a plan of the lectures proposed to be given, and includes an address to the Gentlemen of the Law. The subject is defined in the first few lines:—

"Of legal fictions, quirks, and glosses,  
Attorney's gains and client's losses,  
Of suits created, lost, and won,  
How to undo, and be undone ;  
Whether by Common Law or Civil  
A man goes sooner to the Devil."

The poetical lecturer then goes on to describe the king and his prerogative, and the civil and municipal administration of public justice "allegorically delineated and compared." He then proceeds to show the superiority of the Common Law of England over the Civil Law, and proposes to Mr. Job, Counsellors Bother'um and Bore'um as models for his imitation, and at the same time imparts to him several secrets of the Art of Pleading, such as varnishing o'er the case "that e'en the judge's curious eye shall scarce its rotten parts descry," and also, as to the badgering and confounding of witnesses.

The next lecture is upon the Common Law process, and opens with an invocation to an infernal spirit:—

"Come then, thou Goddess of Contention,  
Genius of craft and circumvention,  
You who in parchment robes arrayed,  
And tape-tied vest of vellum made,  
With ink-stained lips and eyeballs blear'd,  
And thumbs with wax and rosin smeared,



The baleful bitter draughts prepare  
Of poverty, revenge and care,  
And every tender tie remove  
Of unity and social love."

In this lecture all the different kinds of processes are set forth and commented on in no measured terms. The next lecture is a continuation of the same subject—

"Thrice honoured be that lawyer's shade  
Who truth and nonsense first combined,  
And equity with fiction joined,  
And had the goodness to assign us  
LATITAT, CAPIAS and QUO MINUS.  
Melodious sounds ! at once they cheer  
My spirits, and regale mine ear.  
The LATITAT the foe besieges,  
And baffles him in *Banco Regis*,  
Skilled with *Ac-Etiams* to perplex,  
And foil with *Bills of Middlesex*.  
QUO MINUS guides the wordy war  
And *Mates* him at th' Exchequer Bar,  
While CAPIAS is rejoiced to seize  
And plunder him at *Common Pleas*."

Having concluded the subject of processes, and commented on the privileges enjoyed by members of both Houses of Parliament, the author goes on to give a description of the Special Pleader whose chambers he attended :—

"Whoe'er has drawn a Special Plea  
Has heard of old TOM TEWKSBURY,  
Deaf as a post, and thick as mustard,  
He aimed at wit, and bawled and blustered,  
And died a *Nisi prius* Leader,  
That genius was my SPECIAL PLEADER."

He then describes in what an unprofitable manner he spent his three years with Mr. Tewksbury, and makes remarks on the various attorneys who frequented the chambers. Having been called to the Bar he goes Circuit, and makes the acquaintance of a certain Mr. Joseph Ferret, a country attorney, whom he describes as

"A friend to all who are oppressed,  
And seek by law to be redressed,  
One that abhors all compositions,  
All mean *Retraizits* and *Submissions*,  
Scorns *Arbitrations* as a stain  
To *ninth* and *tenth* of WILLIAM's reign."

The praises of JOHN DOE and RICHARD ROE are then sung, which brings the first course of lectures to a conclusion.

The second course treats of pleadings and the composition and structure of the record, illustrated by professional traits of Mr. Tewksbury.

"He in the twinkling of an eye  
 Could all the scattered charms descry,  
*Of Horsepleas, traverses, demurrers,*  
*Feofails, imparlances, and errors,*  
*Averments, Bars and Protestandos,*  
*And puis d'arreign continuandos."*

The blessing of confusion is then alluded to, and how

"One suit another suit succeeds,  
 And damage upon damage breeds."

Next comes an energetic denunciation of the devisers of compromises, which neatly enough expresses the regret felt when a reconciliation breaks out among the parties to the suit.

"Then woe to him who would devise  
 Pacific schemes of compromise;  
 Perish the man who dares control  
 That generous ardour of the soul,  
 That noble, that ingenuous heat  
 Which prompts the truly brave and great,  
 To seek an adversary's ruin,  
 Tho' purchased by his own undoing.  
 May the fat weed of Lethe shed  
 Its dulness o'er this recreant head,  
 Whoe'er has wilfully suppress  
 That passion in his client's breast;

A plague upon all squeamish Pleaders,  
 Proud Juniors, and fastidious Leaders,  
 Humane Attorneys, and all those  
 Who seek a quarrel to compose,  
 Which ably managed, and well nourished,  
 Might soon have taken root and flourished."

Mr. Job is then instructed how to bear himself in Court—how he is to begin by being modest, but as he grows warm in his narration to vociferate, use strong phrases, and gesticulate—

"Arms, legs, and thighs must play their part  
 And aid the Rhetorician's art;  
 Action must all his words enforce,  
 And make his body hold discourse.  
 As nothing props a rotten case  
 Like strength of lungs, save power of face."

The book winds up with an amusing description of a trial for assault and battery, in which specimens are given of the eloquence of Counsellors Bother'um and Bore'um, and of the peculiarities exhibited by certain professional witnesses, the technicalities indulged in by a doctor being in particular severely dealt with. The counsel being at length tired out, and neither having got the better of the other,

"These generous chiefs resolved awhile to end  
 The doubtful conflict, and the suit suspend,  
 Both willingly agreed at once to draw  
*A Special Case, and save the point in Law;*

That so the battle, *neither lost nor won*,  
Continued, ended, and again begun,  
Might still survive, and other suits succeed  
For future heroes of the Gown to lead."

Thus ends this squib, in which, though of course *overdrawn*, some of the characters are so graphically described as to leave no doubt that they were taken from life. The lapse of time therefore since the book was written must necessarily deprive it of some of the interest it must once have possessed, but even now it will well repay the trouble of perusal.

#### NOTES IN THE INNER HOUSE.

*Resignation of Trustees.*—The case of *Blair and others* (Maxwell's Trs.) v. *Maxwell*, has settled a point as to the true construction of the Trusts Acts of 1861 and 1867 of considerable practical importance, and one upon which great dubiety of opinion has prevailed among those interested in such matters. The first of these two Acts (24 & 25 Vict. c. 84) gave a general power of resignation to trustees, unless the contrary were expressed in the trust-deed. The latter Act (30 & 31 Vict. c. 97) provided (sec. 10) that any trustee entitled to resign his office might do so by minute of resignation acknowledged by or intimated to his co-trustee or co-trustees; but it provided further that if any trustee is at the time sole trustee, he should not be entitled to resign until he had provided for the continuance of the trust by the assumption of new trustees with the assent of the beneficiaries, or by applying to the Court stating his wish to resign, and praying for the appointment of a judicial factor or of new trustees. Now in the latter Act there are two, and only two, cases provided for, viz., the case of a trustee who, on resigning, leaves behind him another trustee or other trustees, and the case of a sole trustee, who on resigning leaves no other trustee. No provision is made for the case of several trustees resigning in a body. The question which came up for decision in *Maxwell's Trs. v. Maxwell* was, whether it was competent for trustees to resign in a body. The Court has held that it is. It is well that some rule should be established, and it is obvious that the rule which has been established is in itself a fair, equitable, and useful one; but it is anything but obvious that the Statute of 1867 has been correctly construed. The reason which Lord Gifford (the Lord Ordinary in the case) assigned is not satisfactory. In the note to his interlocutor his Lordship remarks that the contention that the clause in section 10 referring to a sole trustee was not applicable to the case of two or more trustees, was based on a too strict and technical construction of the terms of the section. Two or more trustees, said his Lordship, are often (and rightly so) called the "sole accepting trustees." No doubt; because "trustees" is plural. But it does not follow from

this that the expression "*any trustee who is at the time sole trustee*" means half a dozen trustees. The difference between the two expressions is just this, that "trustees" is plural and "trustee" is singular. In these days there is a general movement towards the abolition of all distinctions,—the distinctions of classes, the distinction between law and equity in England, the distinction between the Inner House and the Outer House in Scotland; but for any sake let us preserve the distinction between the singular and the plural number. The ground on which the judgment of the First Division was based was this: that the power of resignation was conferred, not by the Act of 1867, but by the Act of 1861,—that the power in the Act of 1861 is unqualified, and that the Act of 1867 only imposes certain conditions on the exercise of the power, and points out the methods in which the right may be carried out. But if the second Act is to be regarded as in every case a rider upon the first Act, if the second Act is to be regarded as an executive Act defining the methods in which and in which alone the powers conferred by the first Act can be exercised, then it is clear that in the case in question (that of the whole of the trustees wishing to resign) the trustees cannot resign, because no method applicable to the case is pointed out in the second Act. And on the other hand, if, in the case in question, the absolute power given by the first Act is not affected or limited by the second Act, inasmuch as the second Act does not contemplate the case at all, then it was wholly unnecessary for the trustees to ask leave of the Court to resign, and to pray the Court to provide for the continuance of the trust by appointing a judicial factor. They were entitled to "slip their neck out of the collar" absolutely. The steps which the Court took for the continuance of the trust are not authorised by the Act of 1867, although they are analogous to those provided by it in the case of the resignation of any trustee who "is at the time sole trustee." If the Court had power to impose such conditions on the exercise of the right of resignation, it is difficult to see the use of the provisions in the Act of 1867. But if a legislative provision were necessary to provide for the continuance of the trust in the cases specified (and we cannot assume that an Act of Parliament is meaningless), then it is incompetent to allow resignation and to provide for the continuance of the trust in the cases not contemplated or provided for by the Act.

*Petitions for appointment of factors and also for special powers.*—A point of practice in regard to petitions occurred in the case of *Russel v. Russel*, Nov. 14, 1874. In a petition for the appointment of a judicial factor application was also made for certain special powers. The question arose whether it was competent to combine the two prayers. It would seem that in this matter the practice of the Court has been fluctuating. From the cases cited in Mr. Fraser's *Treatise on Parent and Child* (p. 498), it appears that in the earlier part of the century it was not uncommon to combine the

two. Then this practice came to be reprehended. Of late years it has been creeping in once more. We have known of a petition for the appointment of a *curator bonis* in which power was asked (and granted) for him to sell the heritable estate of the ward. From the infrequency in which petitions appear in the Inner House there has been little opportunity of having an authoritative decision upon the matter. Such a decision has however been given by the First Division, which has determined that special powers will not be granted to a judicial factor at the same time as this appointment itself. The reason is not far to seek. It is the factor's duty to manage the estate, and it is for him to determine whether special powers ought to be applied for or not. There is one special power however, viz., power to complete titles, which it is not incompetent to apply for in the petition for the appointment of a judicial factor. By section 15 of the Trusts Act of 1867 application for authority to complete the title of a judicial factor may be contained in the application for his appointment. See also Titles to Land Consolidation Act, section 24, as altered by section 3 of the Act of 1869.

*Gambling in Stocks—Principal and Agent.*—The case of *Cunninghame v. Lee*, November 13, 1874, was one of the numerous cases arising out of stockbroking transactions which have recently occupied the attention of the Courts in England, Scotland, and Ireland. A solicitor, who was not a stockbroker, purchased certain shares in his own name for a client. When settling day was coming near he wrote to his client informing him that, unless instructions were given authorising a sale for the present and a purchase for the new account, the account would be closed. No instructions came. The shares were carried over in the name of the solicitor,—in whose name they had previously stood. The shares were not actually sold at the time. If they had been, a loss on the transaction would have been sustained. As it happened, the shares rose in the market, and when they were actually sold, some time afterwards, a profit was made. The solicitor, notwithstanding, claimed for the loss at the closing of the account just as if the shares had been sold to a third party, and not carried over to his own account. The Court rejected the claim. Lord Young's ground of rejection apparently was, that it was never intended to take delivery of any shares, that no real purchase was meditated, that the transaction was a mere gambling for the difference, according to the rise or fall of the market; and that was a kind of transaction of such an unfavourable character as not to warrant the interposition of the Court in its support. However objectionable such speculative transactions may be, it has been held in the leading case of *Foulds*, 19 D. 803, that they are not gaming or wagering contracts struck at by the common law or by the Statute 8 & 9 Vict. c. 100. This statute, by the way, does not appear to apply to Scotland; and it is really of no moment whether it does or not, see-

ing that it expresses nothing more than the common law had done before. See remarks of Lord Justice-Clerk (Moncreiff) in *Calder v. Stevenson*, 9 Macph. 1074. In order to avoid a contract on the ground of its being a gambling transaction, it must be one in which the one party must gain and the other must lose. The First Division came to the same conclusion as Lord Young, but they came to it by a different road. Their Lordships held that in the transaction the solicitor acted as an agent,—whether as factor or broker was not of much importance. The Lord President held that being an agent he was entitled, if not freed from the transaction, to sell and charge for the loss; but that he was not entitled to *retain* his principal's property. Lord Deas took the view that where an agent is authorised to purchase in his own name he is entitled to sell and charge for the loss he has sustained, or that he may retain so as to reimburse himself, but that he is not entitled to retain the property and charge for the loss which he has *not* sustained. Lord Deas guarded himself against being supposed to sanction the notion that a *stockbroker* would be entitled to retain the shares of his constituent.

Although the claim in this case was not rejected on the ground of its arising out of a gambling transaction, the disfavour of the Court to speculative transactions in shares is pretty evident, and it is also evident that the Court will give as little help as it can in supporting claims arising out of such transactions.

*School Board's Right of Visitation.*—In the case of the *School Board of Kelso v. Hunter*, December 18, 1874, the petitioners stated that they found it necessary, in the discharge of their duties under the Education Act of 1872, to establish a system of visitation of the schools under their charge. The visits were made at irregular intervals and during school hours. The respondent, the schoolmaster, having denied that right on the part of the School Board, a petition was presented, craving that the schoolmaster should be interdicted from refusing to allow the School Board, or a deputation of their number, to enter the school during school hours, whenever and so often as they might deem it necessary, in discharge of their statutory duties. The interdict was refused. The Court stated that interdict against any person obstructing another in the exercise of a right or in the performance of a duty can only be granted where the right or duty is clear and undoubted. An application for interdict is not the proper form for trying a question of doubtful right. And the right in this case their Lordships of the First Division held to be anything but clear. The School Board are bound to provide sufficient school accommodation, and in order to determine as to the sufficiency of the accommodation, the School Board must have right to visit the school. But it is by no means necessary for that purpose that the visits should be made in school hours, or that the visits should be "visits of surprise." The right of the School Board to visit the school as an educational institution, that is to

say, in order to see whether the work of tuition is properly carried on, so far from being clear, seems rather to be negatived by the provisions of the statute. Inspection of such a kind is confided to Her Majesty's Inspectors of Schools. It may fairly be argued that the Legislature did not intend members of School Boards to take the inspection of the work of tuition, seeing that the statute does not require any qualification for the office, such as might have been expected if it had been intended to confer the power in question. Many members of School Boards have been elected for no other conceivable motive than to show the failure of the old system in overtaking the educational wants of the community.

Of course, in another form of action, it will be competent to try the question whether a deputation of men whose knowledge of the there R's is scanty are entitled to poke their noses into the school-room at any time in order to determine whether the teacher is drilling his boys rightly in Latin and Geometry.

*Truck Act.*—In *M'Innes v. Phillips*, 17th Dec. 1874, the question which came up for the consideration of the Court was whether the defender in the action was an "artificer" within the meaning of the Truck Act (1 & 2 Will. IV. c. 37). If he was, he was by the terms of section 6 not liable to an action for goods supplied on account of wages. The defender was engaged to take charge of the workmen employed, and was expected to take his turn at manual labour when that was necessary to expedite the progress of the work. He did take superintendence of the workmen, and did frequently give manual assistance. The Court held that he did not come under the definition "artificer," on the ground that the 25th section of the Act, which, for the purposes of the Act, separates employers and artificers into two distinct classes, includes among the former "masters, bailiffs, foremen . . . engaged in the hiring, employment, or superintendence of the labour of any such artificers;" and that the fact that a foreman was engaged occasionally in manual labour did not take him out of the category of employers. Many masters give an occasional hand to the work, and it would be singular that in consequence of this they should be taken out of the category of employers.

*Interruption of Negative Prescription.*—The case of *Kermack v. Kermack*, November 27, 1874, raises an important point in relation to the long negative prescription, and one which will make a good many creditors open their eyes.

It has generally been understood that partial payments or payments of interest formed an interruption of the prescription. The questions, which arose in the present case, were first, whether such payments did form an interruption, and secondly, whether these payments could be instructed otherwise than by parole evidence. The Court held that such payments did interrupt prescription, but that they could not be proved otherwise than by writing. Lord

Deas laid it down in the plainest language that such payments could not be proved even by the oath of the debtor.

The Act 1469, cap. 29, establishing the negative prescription, provides, "That the party to whom the obligation is made that has interest therein, shall follow the said obligation within the space of forty years and take document thereupon. And gif he does not, it shall be prescribed and be of nane avail, the said forty years being runnin and unpursued by the partie." In the last century this prescription was regarded as "an odious prescription," and a very liberal view was taken of what amounted to "taking document." It was held that where partial payments or payments of interest were made, and receipts for these were found in the custody of the debtor, prescription was interrupted. And in the case of *Garden v. Rigg*, November 16, 1743, M. 11,274, the Court went a little further, holding that where an indefinite receipt of money applying to no particular debt was given, the application of the sum to the particular debt might be explained by the debtor's acknowledgment on record—which comes remarkably near to allowing the payment to be instructed by the debtor's oath. The Courts in the last century may have been a little too free in their interpretation of the expression "taking document" upon the debt. But one must go a little further or not so far. The law of prescription, as it has now been declared, is indefensible. One must hold either that the payment of interest of itself is an interruption of prescription,—that the production of "document taken" is only to be required when the document is of a kind which you may reasonably expect to find in the custody of the creditor; or, on the other hand, that receipts given to the debtor are not documents taken by the creditor. Ordinarily, a man is considered very foolish if he does not take a receipt for money which he pays. But a debtor, in an obligation to which the Act applies, who for forty years chooses to take no written receipts for the interest he pays, or chooses to destroy the receipts, will do a wise thing. When that period is expired he will be free, and the obligation of the creditor, who has regularly received his termly payments of interest, will be extinguished.

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#### REMARKS ON RECENT ENGLISH CASES.

*Mines—Water.*—It is quite settled that the owner of a mine is entitled to work in the ordinary way without taking any precaution to prevent the escape of water into a lower mine—one farther along the "dip." The whole of the coal or other mineral is his, and if in making the most of his own property injury happens to the next proprietor, the latter has no right to complain. He must protect himself as best he can by leaving a barrier of his own coal. The



case of *Smith v. Kenrick*, 18 L. J. Rep. (C. P.) 172, is the leading one on that point. But, on the other hand, a mine-owner, if he works the mine at all, must work it in the ordinary, proper, and skilful way, and he is not entitled to accumulate water and then throw it down in a mass on the proprietor of the lower mine. In the case of *Baird v. Williamson*, 33 L. J. Rep. (C. P.) 101, the owner of the higher mine pumped up from lower *strata* the water which afterwards flowed into the lower mine, and it was found that he had no right to do so. The question which usually arises in this class of cases is whether the working of the mine has been conducted in the usual and in a proper and skilful manner. In the case of *Durham v. Hood*, 9 Macph. 474, for example, the question was, whether the blasting operations of one of the parties, which had been followed at least by, if they had not caused, a dislocation of the strata, in consequence of which the water flowed into the lower mine, were not extraordinary operations, out of the usual course of mining.

In the recent case of *Crompton v. Lee* (31 L. Times Rep. N. S. 469) before Vice-Chancellor Hall, a question of this kind arose. The plaintiff stated that the defendant was working his mine so near the bed of a river, that the operations must result in the bed of the river giving way and both mines (the plaintiff's being the lower of the two) being flooded. The defendant demurred on the ground that the plaintiff had no right to interfere with the natural working of the mine. But the Vice-Chancellor held that what was alleged was a relevant ground of action. In all cases of this class reference is made to the judgment of Mr. Justice Blackburn in *Rylands v. Fletcher* (L. R., 3 E. & I. App. 330), a case as to the damage resulting from the bursting of a reservoir. "The true rule of law is that the person who for his own purposes brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so he is *prima facie* answerable for all the damage which is the natural consequence of its escape. . . . The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth from his neighbour's privy [this is a reference to an old case in *Salkeld*], or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own, and it seems but reasonable and just, that the neighbour who has brought something on his property (which was not naturally there), harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for this act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequence; and upon authority this.

we think, is established to be the law, whether the things so brought be beasts or water or filth or stenches." In *Crompton v. Lee* the Vice-Chancellor held, that if the defendant was responsible for any damage in his method of working the mine the plaintiff was entitled to restrain him before the damage occurred.

In *Rylands v. Fletcher* the damage, as we have said, arose from the bursting of a reservoir. In an appeal from India not long since, their Lordships of the Privy Council held that an action would not lie for the damage caused by the bursting of a tank, that being, so to speak, an established national institution in India.

*Technicalities of English Law.*—The law of England is fearfully and wonderfully made. An illustration of the survivance of ancient forms, and the necessity of attention to these in the absence of express waiver, occurred a week or two ago in the case of *Herbert v. Webster*, a jury case in the Common Pleas, recently reported in the *Times*. The action was an action of ejectment. The lease did not contain, as English leases do usually contain, a clause dispensing with a formal demand for rent. Consequently, it was necessary to prove that the sum due was demanded on the premises at an hour before sunset on the last day on which the rent could be paid. Mr. Justice Keating, the presiding judge, remarked that this was the first case in which he had known of proof of the demand being required.

The case of *Bain v. Fothergill*, decided in the House of Lords (43 L. J. Rep. (Ex.) 243), shows how authoritative even a solitary precedent is in England. In that case it was held that if one contracts to sell heritable estate, and is unable to complete the sale from want of title, whether he is or is not aware of the defect at the time of entering into the contract, or even if he never had title or possession nor any right to possession, he is in the absence of fraud not liable in damages to the intending purchaser. This was held on the authority of the case of *Floureau v. Thornhill* (2 W. Black, 1078), decided a hundred years ago. It was admitted by the judges in *Bain v. Fothergill* that the report of *Floureau's* case was meagre and obscure, and that, so far as reasons were stated, these reasons were insufficient. Baron Pollock states the reasons which led him to support the rule laid down a hundred years ago. 1. No layman can tell whether he has or has not a good title to real property:—which says very little for the English law. 2. Although goods are purchased with the intention in most cases of being immediately resold, and the title of the vendor and the chance of the title not being supplied may fairly be presumed to be in the minds of the contracting parties, this is not so with purchases of real estate. Land is not usually purchased with the intention of being immediately resold. But this is surely a very lame reason. If a man buys anything, land or goods, whether with the intention of selling it immediately or with the intention of never selling it at all, it must surely be in the mind of him, as one of the contracting parties, that the other contracting party has a right to the thing sold and

can give a title to it. The reason however which appears to be the substantial reason on which the learned judge rests his opinion is this: "If the decision in *Floureau v. Thornhill* was one to which at the time I could not have acceded, I should nevertheless think that a contract of purchase and sale of real estate made at this day must be construed to be made on the footing of that decision being correct. All persons who prepare such contracts know of that decision, and that it has been acquiesced in for a hundred years."

The case of *Ellis v. Loftus Iron Co.* (31 L. T., N. S., 483) illustrates the peculiarities attaching to the legal fiction of "trespass." The plaintiff was the occupier of a farm, and by arrangement between him, his landlord and the defendants, a portion of a field was let to the defendants. The plot was fenced in by a wire fence, the condition of which was known to both parties. The plaintiff put his mare into his portion of the field, and the defendants put their mare into their portion of the field. The two animals got close together on either side of the fence, and the defendants' animal injured the other by kicking and biting it through the fence. The Court of Common Pleas held, in the first place, that the defendants were guilty of trespass by reason of the horse sticking its leg through the fence. The accident, said Coleridge, C.J., "could not have happened, unless some portion of the horse of the defendants had been protruding over the land of the plaintiff. . . . Whether it be an inch or an ell, it is a trespass all the same." Mr. Justice Denman, though at first staggered with the proposition that if an animal strays ever so little over another man's land its owner is liable in trespass, yet, on referring to the cases, and considering the maxim *cujus est solum ejus est usque ad cælum*, he came to agree with the other judges. The Court held, in the second place, that a trespass having been committed, and an injury having resulted, the owner of the horse was liable in damages. With our Scottish notions as to trespass, all this seems a very round-about way of getting at the justice of the case, or rather a very round-about way of not getting at it. To us the real question seems to be, not whether the defendants were guilty of trespass, but whether the accident was caused by the negligence of the defendants; and the further question would follow whether there was not contributory negligence of the plaintiff.

*Railway Cases.*—A thoughtful suggestion was made by Chief-Justice Cockburn in a very recent case tried by his Lordship and a jury. Damages were asked on account of the injury sustained in a railway collision. There was the usual conflict of evidence as to whether the shock to the nervous system was permanent or temporary. The truth is, that in a matter of that kind nobody can tell. The Chief-Justice observed, that it would be well if there were some means of assessing the damages conditionally;—the whole sum to be paid in the event of a failure to recover, and a less sum to be paid in the event of a total recovery. There would require to be referees

of skill appointed to determine whether the patient had or had not recovered. The obvious objection to the course suggested is that there would be so few cases of total recovery.

The case of *Jackson v. The Metropolitan Railway Co.* (31 L. T., N. S., 475) related to the liability of a railway company for an accident occurring through an insufficient supply of railway servants. The facts were these: There was a great crowd at a station which the train stopped at, in which the defender was a passenger. The carriage had already its proper complement of passengers; but a rush being made by the crowd, three additional passengers got into the plaintiff's carriage. There was no sitting-room for the newcomers. At the next station there was again a great crowd, and more persons endeavoured to force themselves into the carriage, but were kept out by the plaintiff, who shut the door. After the train was in motion another attempt to enter was made by some of the crowd, who opened the door. The plaintiff, while endeavouring to prevent their entrance, was bumped against by the passengers standing in his carriage, and to save himself from falling out of the carriage he put out his hand. At this moment, the train being about to enter a tunnel, a porter shut the door and crushed the plaintiff's hand. The Court of Common Pleas held that there was evidence upon which the jury might fairly find negligence in the railway company. It was held that though there might not have been evidence of negligence in the fact of the extra passengers getting into the carriage at first, there was negligence on the part of the company allowing them to continue there to the inconvenience of the other passengers after the train arrived at the next station, and when there was an opportunity of removing them. It does not appear that the plaintiff desired the officials of the company to remove these persons. Further, the negligence of the company contributed to the accident, inasmuch as if they had had a sufficient staff of servants the circumstances would not have existed which caused that incommmodation of the plaintiff, which incommmodation led to the act on his part from which the injury resulted. The contention of the railway company was, that they were not responsible for the existence of a crowd at their station. The answer of the Court, as given by the Chief Justice of the Common Pleas, was, that although the existence of a crowd was no evidence of negligence on the part of the company, yet, as that was the ordinary and well-known mode in which people were collected on the company's platforms, it was a thing which might be reasonably expected, and it therefore threw upon the company a duty which they could not evade, without being guilty of negligence, to have such a number of servants in attendance as would be sufficient to control the crowd which was there collected, and which was usually collected.

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## Reviews.

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*International Courts of Arbitration.* By THOMAS BALCH, Author of "Les Français en Amérique," "Les Crises Financière et les Chemins de Fer Américains," etc. Cambridge: Printed at the Riverside Press. 1874.

THE scope of this pamphlet is limited. It does not profess to deal with the general question, as to the best means of developing and administering a system of International Law. It is generally a recommendation of arbitration as preferable to war in the settlement of international disputes, and an explanation of the limits within which arbitration is likely to be useful and practicable. It rather suggests difficulties than attempts to solve them. Throughout the author is entitled to credit for the practical bearing of his views, and the spirit in which they are expressed.

Mr. Balch begins by pointing out that the claims referred by the Treaty of Washington were admirably suited for settlement by arbitration. In that we think few people will disagree with him, though they may be disinclined to follow him in assuming that we were on the verge of a war with America; but before arbitration could have been resorted to there were certain preliminary conditions. First of all, the parties approached each other in a friendly spirit. Her Majesty's plenipotentiaries were instructed to express regret for the escape, *under any circumstances*, of the Alabama and other vessels, and for the depredations committed by them. In the next place, no points of law or principle were submitted to arbitration—Great Britain not only denied culpable negligence in the matter, but also legal liability under the existing law of nations, and it was only *ex gratia* that she consented to be bound by the three rules. What therefore was submitted was purely a question of fact in dispute between two friendly powers, a very proper occasion indeed for an amicable settlement.

It is curious to note Mr. Balch's opinions of the three rules in connection with Professor Lorimer's recent remarks on the subject. He says: "The three rules are so obnoxious to numerous and serious objections that it is much to be hoped, in the interest of neutrals, and honest people generally, that the United States and England will disagree so permanently and effectually as to their construction and meaning as to have nothing more said or heard of them, except the just and severe criticism and condemnation which they will probably receive from the distinguished jurists who are soon to meet at Geneva. Had the synod of diplomatists who framed these obscurely expressed rules profited by the occasion to overthrow some of the barbarisms still upheld, and for example joined in adopting as a principle of law the decision of the Supreme Court at Berlin, 'that every contract for introducing contraband goods into a friendly state is contrary to law and morals,' they would have rendered a vast service to mankind."

Mr. Balch republishes in this pamphlet a letter addressed to the *New York Tribune* in 1865, or nearly six years before the treaty of Washington, in which the provisions of the treaty were foreshadowed. He also

reprints a very interesting and instructive letter from Professor Lorimer to him dated 10th February last, the views contained in which he almost wholly endorses. The letter is too long to be quoted here, but the gist of it is, that arbitration is *not* suitable to disputes between civilized and barbarous nations; that it is not suitable to disputes with home barbarians, such as the Communists were; that it is inapplicable also where the question really at issue is not the one on the surface, as has been the case in almost every recent European war; and generally that arbitration in international relations is not likely to yield greater results than it does in municipal relations, especially seeing how far municipal organization has advanced beyond international organizations and municipal law beyond international law.

W. S. P.

*Analysis of the Conveyancing (Scotland) Act, 1874.* By JOHN T. MOWBRAY, W.S. Edinburgh: Bell and Bradfute. 1874.

*Synopsis of the Titles to Land and Conveyancing Acts.* Edinburgh: W. Burness. 1874.

THE recent Conveyancing Act, which it is to be hoped will continue to be for some time to come the baby of the numerous family of conveyancing statutes, made most material alterations on the previously existing law. Every conveyancer must study the new Act for himself, but there are few conveyancers who can afford to ignore such assistance as is rendered by the two books which are the subject of this notice. There are two ways in which the effect of this recent Act may be stated and explained. You may point out the alteration which the Act has made on the previous law, and that is what Mr. Mowbray has done, and done well; or you may give a statement of the law as it has been altered, and that is what has been done by the compilers of the other work under notice. This latter work is not a commentary on the recent Act. It takes as its groundwork the Titles to Land Act of 1868, the sections of which it reprints, dovetailing into these, in the appropriate places, the sections of the Amending Act of 1869, and of the Conveyancing Act of last year. It would have saved a good deal of trouble if, instead of an Act altering the previous law, to understand the effect of which it is necessary to compare the old statute and the new at every step, we had been favoured with a new consolidation statute. That has not been done. But the compilers of the Synopsis have done their best to supply the place of such a consolidation statute. Avoiding commentary and speculation on the effect of recent enactments, the work lays before the student, in a regulated form, the whole provisions of the conveyancing existing statutes.

The objects of the two works under review are different. Both are useful.

## The Month.

*Stipendiary Magistrates.*—It will be remembered that a couple of years ago Lord Advocate Young introduced a Bill authorising

the municipalities of large towns in Scotland to appoint, or rather to have, stipendiary magistrates, if they chose. The proposal was approved of; but some of the municipal bodies claimed to have the right of appointing the magistrate; and his Lordship refused to agree to this; and quite right he was. Last year the Town Council of Glasgow desired to have a stipendiary magistrate, but as the Government refused, as their predecessors had done before, to surrender the Crown's right of appointment to a judicial office, the Bill was withdrawn. It may be of interest to notice how far the English municipalities have taken advantage of the power conferred by an Act similar to Mr. Young's Bill. The Act 26 & 27 Vict. cap. 97, enabled cities, towns, and boroughs in England and Wales, of 25,000 inhabitants and upwards, to appoint stipendiary magistrates. The preamble of the Act states that the office of Justice of the Peace within populous cities and places had become difficult and burdensome, on account not only of the great and increasing population, but also because of the difficult and important legal questions that arise, and adds that there was good reason to believe that these cities and places would secure the services of stipendiary magistrates, being barristers of not less than five years standing, for the more speedy and effectual execution of the office of magistrate, the better protection of the persons and properties of the inhabitants, and the advantage of the public. The Act has been in operation since 1863. From a return presented to the House of Commons it appears that only *six* places have taken advantage of the Act. Of course this is exclusive of the metropolis, to which a separate Act applies, which provides for the appointment of twenty-seven stipendiary magistrates. The reason why so few places have taken advantage of the Act is, we presume,

"That eternal want of pence  
Which vexes public men."

*Law as a Science and as an Art.*—The above was the subject of an address by Professor Sheldon Amos to the students of the jurisprudence class at University College, Gower Street.

The Professor said that when a young man commenced the study of law, whether by attendance in an office or chambers, or by reading Blackstone's Commentaries, or dipping into Smith's or White and Tudor's Leading Cases, or by exercising himself at a debating society in forensic disputation, he was addressing himself to the study of an art, and not of a science. He was trying to acquaint himself with the body of formal rules which made up the law of England; he was learning, when occasion served, to elicit the rules for himself; he was familiarizing himself with the modes of reasoning by which statutes were explained, and a general principle first judicially educed out of a number of analogous decisions, and then applied to acts presenting themselves for the first time; he was preparing himself for work, for action, for life; he was studying law as an art. Up to very recent times in England the only notion of studying law had been that of studying it as an art. An exception to that state-

men might be made for the case of the study of the civil and canon law at the universities, and for the sort of general legal training which at one time was sought in the Inns of Court by a much larger class of students than that of persons intending to follow law as a profession. A number of influences had been co-operating in the present century in England to bring about the discovery that law admitted of being studied as a science no less than as an art, and that there were as sufficient reasons for cultivating the knowledge of law in the former as in the latter aspect. Apart from the more general, and less easily assignable, influences conducting to the result of law being raised to a truly scientific platform, the phenomenon of Bentham's works and writings was most deserving of notice. Bentham could never be content with studying law as an art. His keen sense of moral justice, his restless logical faculty, his irrepressible political aspirations, his self-confidence ever merging into egotism and even self-conceit, wholly unfitted him for patiently and servilely learning the rules and method of English or any other system of law with the simple object of turning his arguments to direct professional account. Bentham was a moral philosopher, an English lawyer, a political revolutionist, a constructive statesman, and a remorseless critic all at once; in his writings he often figured as all at once. It was thus difficult to ascertain the precise amount of Bentham's influence in any single direction, though it has been universally confessed that his influence in all directions was incalculably great. The breadth of Bentham's interests, no doubt, of itself conduced largely to favour the scientific study of law. It began to be felt that if English law was now the perfection of reason, then there must be some reasonable standard to which the law of every country logically must, and morally ought to, conform. The indirect teaching of Bentham in the direction of legal science was stimulated and fortified by the spasm of codification which in the early part of the present century seized upon the states of Europe. There was no more favourite topic with Bentham than that one, and none to which he more persistently invited the attention of his countrymen. Mr. Austin, far more distinctly than his predecessor, conceived the existence of a distinct branch of study of a severely scientific character, and conversant with the logical principles which necessarily and invariably underlie every possible system of law. To that branch of study, dealing solely with abstractions, and relieved from the concrete technicalities of any particular system, he confined the name jurisprudence, which name he also compendiously explained to mean the "Philosophy of Positive Law." An attentive student could not read Mr. Austin's works without, perhaps unconsciously to himself, coming into the possession of a new faculty. Not only was he rapt by a new-born enthusiasm, but he discovered a rich field of interest in a quarter in which he would, unassisted, have been least likely to search for it. In a region which was proverbially the dulllest, driest, and hardest, he found opening out before him the fascinating vistas of a true science, which by its methods and the width of its range at once connected his pursuits with the most alluring studies of the present age. He found himself at once transported from the dreary purlieus of a technical art into the universal sunshine of a genuine science. Although it was cheerfully conceded to Mr. Austin that he was the first Englishman who had rescued the study of law from the somewhat grovelling associations with



which it was habitually bound up, yet it was now widely admitted that he hemmed round the scientific aspects of law with too close a hedge. Since Mr. Austin's time there had been some portions of the fabric of legal science which had been coming into conspicuous relief. After some reference to the necessity of an inquiry into the meaning, origin and import of such terms as State, constitution, marriage, infant, etc., the professor said that the origin of law itself, as discoverable in the constitution of man and of human society, as related to man's logical and ethical nature, and as controlled by the facts of the physical universe, formed an inseparable element in legal science, though it was wholly irrelevant to law as an art. What he desired to insist upon was, that there was a specific amount of information relative to the primary institutions of social life which was indispensable to the student of the science of law. He then said that perhaps one of the most disputable points relative to the present subject was, whether or not the origin and nature of what was called "The Law of Nations," or "International Law," was properly included among the topics of the science of law. It was well known that Mr. Austin relegated the whole subject to that of morals, and denied to "International Law" the name of Law, because it did not satisfy the definition which he placed on the term. That was a good instance of the peril and worthlessness of making precipitate and inelastic definitions of moral terms. Every one knew that for a vast number of purposes rules of international law had all the qualities of rules of national law. They were cited, established and argued upon in courts of justice in a manner in no respect distinguishable from that familiar in the case of all other rules of law. They needed the same sort of rigorous professional study, and were many of them so much implicated with rules and principles of English law, that it was impossible to master the one class without attaining to a considerable acquaintance with the other. And yet it was true that it was almost impossible to frame a compact form of words which should exactly cover, and no more than cover, the meaning of the term law in both cases. What was really common in the two meanings must be sought for in a laborious and somewhat lengthy analysis, the results of which did not admit of being shortly and compressedly stated. It must be allowed that the topics of the origin and nature (though not the contents) of the "Law of Nations," and of its leading points, was one of those which must be added to the fabric of the science of law as conceived by Mr. Austin. The topic of the abiding relation of law to the moral activity of man also belonged to the science of law. The true nature of law could only be fully expounded by a reference to the necessary and permanent limits within which its usefulness was confined; and therefore an inquiry into the place and direction of those limits, *i.e.*, into the relation of law to morality on the one hand, and to government on the other, was an indispensable portion of legal research. The complete study of the science of law involved, or rather presupposed, the study of much else beside. History, descriptive sociology, Roman Law, Foreign Law and International Law, logic, ethics and politics, were none of them alien, were most of them essential, and were all of them helpful to the fit furnishing of the student of legal science.

*Appointment.*—Mr. Æ. J. G. MACKAY, B. A. Oxon., advocate, author of a recently published life of the first Lord Stair, has been

appointed to the Professorship of Constitutional Law and History in the University of Edinburgh, vacant by the death of Mr. Cosmo Innes. Mr. Mackay was called to the Bar in 1864.

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### Obituary.

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LORD ROMILLY died on the 23rd December last, at the age of 72. He was called to the Bar in 1827, was made Solicitor-General of England in 1848, Attorney-General in 1850, and Master of the Rolls in 1851. It will be remembered that Lord Macaulay's most successful speech was in opposition to Lord Hotham's bill, to make the Master of the Rolls ineligible to sit in the House of Commons. The bill was defeated; but neither of the holders of the office has since that time courted the favour of a constituency, and the disqualification proposed by Lord Hotham has at last become law. Sir John Romilly was raised to the peerage in 1866. He retired from the Mastership of the Rolls about two years ago, and was succeeded by Sir George Jessel. The descendant of a French Huguenot refugee was succeeded by a Jew. On the death of Lord Westbury, Lord Romilly was appointed arbitrator in the affairs of the European Insurance Society. It is said that his Lordship got through his judicial work with great rapidity. His work, however, did not last. Anyone taking even a cursory glance over the Chancery Reports must be startled at the frequency with which his judgments were reversed. If one were to make a digest of cases reversed, a set of Beavan's Reports would be very handy.

DAVID HECTOR, Esq., Advocate, Sheriff of Wigtown and Kirkcudbright, died at his residence at Moffat on the 22nd December last, at the age of 72. Mr. Hector practised as a Writer to the Signet until 1837, when he was called to the Bar. He was appointed Advocate-depute in 1851 or 1852, and Sheriff in 1861. Mr. Hector had for many years past ceased to practise at the Bar. No vacancy in the office of Sheriff is caused by his decease,—the Act 33 & 34 Vict. cap. 86, having provided that, in the event of a vacancy occurring, the counties of Wigtown and Kirkcudbright should be united with the county of Dumfries into one Sheriffdom.

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### Notes of English, American, and Colonial Cases.

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**BANK-CHEQUE PAYABLE TO ORDER.**—*Forged endorsement.*—Though the banker on whom a cheque is drawn which is payable to order is protected by 16 & 17 Vict. cap. 59, sec. 19, from proving it to be endorsed by the person to whose

order it is made payable, if it purports to be so endorsed, yet a third person who cashes such cheque is not so protected, and if the endorsement of the name of the payee to whose order it was made payable be a forgery, such third person will be liable to refund to the drawer the money he received on the cheque when it was honoured by the banker on whom it was drawn.—*Ogden v. Benas*, 43 L. J. Rep. (C. P.) 259.

**BILL OF LADING.**—*Exception of thieves, barratry of master and mariners, and damage to goods.*—Plaintiffs shipped diamonds on board defts.' vessel under bills of lading, containing the exceptions "thieves, barratry of master and mariners. . . . The shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance." One box of the diamonds was stolen during the voyage; but there was no evidence to show whether it was stolen by one of the crew, or by a passenger, or by some person from the shore after the vessel's arrival in port:—*Held*, first, that the term "thieves" in the exception applied to strangers, and not to persons belonging to the vessel; secondly, that assuming theft by one of the crew to be "barratry," the defts. must bring the case within the exception by positive proof, which they had failed to do; thirdly, that the words "damage to any goods" were confined to cases where the goods receive damage from a peril insured against, but not to cases where there has been not damage to the goods, but a total abstraction of them.—*Taylor v. The Liverpool and Great Western Steam Co.*, 43 L. J. Rep. (Q. B.) 205.

**CARRIERS BY RAILWAY.**—*Authority to incur reasonable and necessary expenses for owner of goods.*—When carriers by land have carried goods to their destination, in pursuance of a contract with one who is both consignor and consignee, and through his default the goods are left in the carriers' hands, they are bound to take reasonable measures for the preservation of the goods, and can recover from him payments they have made on account of expenses so incurred.—*The Great Northern Rail. Co. v. Swaffield*, 43 L. J. Rep. (Ex.) 89.

**MEASURE OF DAMAGES.**—*Breach of contract by non-delivery of article to be manufactured.*—Deft., in January 1872, agreed to furnish plta. with a quantity of sets of wheels and axles, according to tracings, to be delivered on certain specified days, free on board at Hull. Plts. were under a contract with a Russian railway company to deliver them 1,000 covered waggons, 500 on the 1st of May 1872, and 500 on the 31st of May 1873, under a penalty of two roubles per wagon for each day's delay in delivery. In the course of the negotiations between plta. and deft., deft. was told by plta. that they wanted the wheels and axles to complete waggons which they were bound to deliver under penalties, but neither the precise day for the delivery nor the amount of the penalties was mentioned. Deft. did not deliver the sets of wheels in time, and plts. in consequence had to pay certain penalties, but the Russian company consented to take one rouble a day, amounting in the whole to £100:—*Held*, that though plta. were not entitled to recover in an action for breach of contract, as a matter of right, the amount of the penalties, yet the jury might reasonably assess the damages at that amount.—*Die Elbinger Actien-Gesellschaft für Fabrication von Eisenbahn Materiel v. Armstrong*, 43 L. J. Rep. (Q. B.) 211.

**DEMURRAGE.**—*"To be loaded with the usual dispatch of the port."*—By charter-party, the master or plt.'s ship engaged to receive on board a full cargo of coal, and deliver, &c., "to be loaded with the usual dispatch of the port, . . . or if longer detained to be paid 40s. per day demurrage." The defts. engaged to load her "on the above terms." By a memorandum at the foot of the charter-party she was to load in the B. or W. Docks, by a regulation of which coal-agents were not to have more than three vessels loading and to load at the same time. Plt.'s ship would have been loaded without delay had it not been for the fact, unknown to the plt., that defts. acted as their own coal-agents, and that they had three ships loading in the docks, and ten other charters in their books which had priority over plt.'s ship. By reason of the incapacity

under which defts. had so placed themselves, the loading could not be commenced until thirty days after the ship was ready :—*Held*, in an action for demurrage, that defts. had contracted that they would load with the usual dispatch, and that it was no answer that they were unable to do so, or that plt. knew it.—*Ashcroft v. The Crow Orchard Colliery Co.*, 43 L. J. Rep., (Q. B.) 194.

**LEGACY.**—*General or specific.*—A married woman having a testamentary power of appointment over a certain settled sum of stock, by her will appointed the stock, "or the stocks or funds which might at her death represent such trust funds," to certain legatees :—*Held*, the legacies were specific, not general.—*Davies v. Fowler*, 43 L. J. Rep. (C. L.) 90.

**GUARANTEE.**—*Continuing guarantee.*—Plts. (of whom D. had been in the habit of buying goods) having heard of a bill of sale given by D. to defts., declined to let D. have certain goods he had then bought of them without a telegram from defts. that defts. would be answerable for them. Defts. sent such telegram, and D. had the goods, and in due time paid for them. By the post of the same day on which the telegram was despatched the defts. sent to plts. a letter, in which, after referring to the telegram, and stating that they had done business with D. for five years and had never known anything dishonest in his transactions, they said, "What you have heard was done to protect him from a dishonest tradesman, and will in no way, we hope, be to the injury of his creditors. Having every confidence in him, he has but to call upon us for a cheque and have it with pleasure, for any account he may have with you. When to the contrary we will write you :—" *Held* that this letter was a continuing guarantee for the amount of goods D. should buy of the plts. until recalled.—*Nottingham Hide, Skin, and Fat Market Co. v. Bottrik and Another*, 42 L. J., C. P. 256.

**NEGLIGENCE.**—*Railways Regulation Act 1868*—*Communication between Passengers and Guard.*—A railway train is or is not within the operation of section 22 of the Railways Regulation Act 1868 (which requires railway companies to provide communication between passengers and guard when a train runs twenty miles without stopping), according to the actual instructions as to stopping given to the company's servants in charge of the train. And therefore, where the primary cause of an accident to a train not provided with such means of communication was the breaking of a wheel-tire (without any negligence on the part of the company or their servants), and several minutes elapsed between the first shock felt by the passengers and the actual disaster resulting in the mischief complained of, it was properly left to the jury to say—first, What was the effect of the company's time tables taken together with the special instructions given to their servants with regard to the train in question? and second, Whether the absence of the statutory precaution was conducive to the accident which occurred?—*Blamires v. Lancashire and Yorkshire Rail. Co.* (Ex. Ch.), 42 L. J. Ex. 182.

**FRIENDLY SOCIETY.**—*Sickness entitling member to relief*—*Insanity.*—By rules of a friendly society established under 18 & 19 Vict. c. 63, s. 9, a member under certain conditions was entitled to receive 8s. a week during any sickness or accident that might befall him, unless by rioting or drunkenness, etc. :—*Held*, in the absence of words showing a different intention, that insanity was a sickness which entitled a member to relief under the above rule.—*Burton v. Eyden*, 42 L. J., Mag. Ca. 115.

**BREAD.**—*Sale of otherwise than by weight.*—The appt. was convicted under 6 & 7 Will. IV. c. 37, s. 4, for selling bread without having a correct beam or scales, etc. The material of which the bread was made was in all respects the same as ordinary bread, except that carbonic acid gas was forced into it. It was crusty all round, and was known in the trade as French or fancy bread, but in no way, except the manner of baking in separate loaves, resembled what was called French or fancy bread at the time of the passing of the Act :—*Held*, that

the conviction was right, as the proviso in s. 4 could not be construed to apply to bread of such a description. *The Queen v. Wood* (38 L. J. Rep. (N.S.) M. C. 144) observed upon.—*The Aerated Bread Company v. Grigg*, 42 L. J., Mag. Ca. 117.

## The Scottish Law Magazine and Sheriff Court Reporter.

### SHERIFF COURT OF ABERDEENSHIRE.

Sheriff COMRIE THOMSON.

STEWART, ROWELL STEWART AND COMPANY v. JAMES DAVIDSON.—Oct. 14, 1874.

*Landlord Act—Writ—Action instituted.*—This was a complaint under the Master and Servant Act for breach of contract of service. The contract founded on (which was for four years, and had not been implemented in any shape) was objected to as improbable in respect that the writer of the written portion of it was not designed in the testing clause.

The Sheriff pronounced the following judgment:—

"The contract for service is one for four years, and consequently is reduced to writing. The document is partly printed and partly written, and it happens that in the testing clause the designation of the writer of that portion of the contract which is written is not given, and consequently the document was bad under the law, as it stood prior to the Conveyancing Act of 1874. Now we all know that the 149th section of the 1868 Act provides that deeds may be partly written and partly printed, but renders it necessary that the designation of the writer should appear. That was repealed by the statute of last year, and it is now no longer necessary for the validity of any deed, whether relating to land or any other matter, that the writer should be designed in the testing clause. But then that only takes effect from the time the Act of 1874 came into operation, which was on the first day of the present month; and there is a saving clause in the latter Act which provides 'Nothing herein contained shall affect any action now in dependence or that shall be instituted before the commencement of this Act,' while this complaint was presented on the 30th September. Upon that day a warrant of service was written out and signed, which was executed upon the first day of October. I must confess my disposition is against sustaining the plea for the respondent, but I must subdue my inclination, as I think it impossible to meet the plea except to hold that this action was instituted before the Act commenced. If the words had been 'any action now in dependence' only, there would have been more doubt about the point, as the authorities are conflicting, and according to Shand's Practice this action was not in dependence. But again, since this dictum there have been authorities to throw considerable doubt upon it—the Lord President saying he considered an action to be in dependence from the signeting of the summons. But the words quoted are not the only words used in the 1874 Act, for it says 'any action that shall be instituted before the commencement of this Act.' I cannot doubt that this complaint was instituted when it was presented in Court—when the clerk wrote upon it, and the deliverance was signed. With this opinion, I must dismiss the complaint, but will not allow expenses to either party."

*Act.—J. Duncan, jun.—Alt.—P. Clark.*

THE  
JOURNAL OF JURISPRUDENCE.

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NOTES ON THE *ACTIO INJURIARUM* AND THE  
SCOTCH LAW OF DEFAMATION.

ON turning to the cases of defamation prior to the establishment of the Jury Court and the system of issues, we find a set of phrases and authorities which have almost disappeared from our later law. These were derived from the Roman law of injuries, which exercised an important though somewhat indefinite influence over the corresponding Scotch law of that period. In some respects the results of this influence were less satisfactory than those obtained from the application of the civil law to other questions. The fundamental conception of the *actio injuriarum* was singular and characteristic, and differed widely from the dominant ideas of the Scotch law. Hence its doctrines and phraseology frequently caused no small confusion when applied to grounds of action which were foreign to its original conception. We are now pretty well rid of those perplexities, chiefly because our present forms and terminology must be traced to the English law rather than to the earlier Scotch sources; and the interest which attaches to the *actio injuriarum*, and its relation to Scotch law, is therefore mainly historical. But even its historical discussion may have some indirect relation to practice; for it may suggest that our present stage of simplicity has been attained by a process of obliteration which has buried some distinctions that might as well have been preserved.

We can best appreciate the character of the *actio injuriarum* and its position in the Roman system by commencing with its earliest forms. The history of its development from them is unbroken, and the leading ideas of the old law underwent no further transmutation at the hands of the later legislation and scientific jurisprudence than was absolutely necessary, in order to fit them to the changed conditions of society. Going back therefore to the oldest known sources, we find in the Twelve Tables a group of four enactments,

which in substance have been pretty fully preserved to us, and which seem intended to exhaust that department of law to which they relate. Taking these in order according to the severity of the penalty imposed, we find in the first place that the penalty of death was awarded "*Si quis occentassit sibi carmen condidisset quod infamiam faceret flagitium ve alteri.*" *Occentare* was in later times explained by *convicium*, and must have meant some form of noisy public affront which was thought sufficiently serious to be put on the same footing with that deadly offence in all early societies, the composition of scurrilous songs. Next in order came the destruction or laming of a member of the body, which was punished by *talio*. "*Si membrum rupsit ni cum eo pacit talio esto.*" Then we have the penalty of 300 *asses* for a broken bone. And, lastly, we find an enactment in more general terms "*Si injuriarum faxit xxv. aeris poenae sunt,*" which probably related to assaults of a slighter character than those dealt with in the preceding laws. At the time of the Twelve Tables it is not likely that these offences were consciously recognised as falling under a common head, and it is obvious, of course, that whatever might be the case in popular language, the word *injuria*, as a technical term, was confined to the last. But, nevertheless, they possessed elements in common, which made them the starting-point of the later law, and ultimately enabled the jurists to class them as species of one delict. They were all direct personal aggressions. The real object of the attack, whether by word or blow, was the person himself, and in this point they admitted of being sharply distinguished from offences against property, such as theft, in which the aim is wholly directed against the property with the smallest possible reference to the owner.

We must remember that at this early time the greater part of those offences against the individual which we now include in the category of crime were regarded from a totally different point of view from that which is now prevalent. They gave rise to strictly private rights, which stood in no closer relation to the community than ordinary rights of debt or property. The penalty was exigible purely at the will of the individual, and he might settle with the offender or remit it entirely at his pleasure. The modern view, which starts with the motive of prevention, and makes the wrong to the individual a ground of action for the State, was either wholly unknown or exhibited its influence indirectly. As a general rule those acts alone involved the action of the community which were directly aimed at its interests. In the case of homicide, for example, to pass over more obvious instances, the State was injured by being deprived of one of its members, a loss that was always severely felt and resented in the old burgher communities. In such cases the action of the State absorbed and included within it the action of the individual. But in cases where the State had no direct incentive to interference, the wrong was regarded as a matter

of purely individual concern, and the State interfered no further than to regulate and sanction the manner and extent of the remedy, and occasionally to aid in its execution. When the motive of prevention appeared at all it was in this guise, that in wrongs which were especially dangerous, either from their frequency or their consequences, the sympathetic fear of the community was led to sanction a sharper or more efficacious remedy. But their standpoint was still that of the individual, and, as a general rule, it was only by their permission of more severe action on his part that they expressed their fear for themselves.

Now, the manner in which the Roman law dealt with the personal injuries, put in the clearest light the contrast between the ancient and modern points of view. Nearly all these offences are with us matters of State interference. They are crimes in the modern sense. But with the Romans they were private wrongs, which called for private redress, under the sanctions and limitations which were pointed out by the general sense of the community. Nor could there be any doubt as to what this redress meant. It was not reparation in the sense of compensation for loss, nor solatium in the sense of a pecuniary equivalent for wounded feelings. But in one sense, and that the strictest, it was the only possible reparation for personal injury, for it was vindictive satisfaction. Nothing could repair directly the pain suffered from a bodily hurt, and the ingenious idea of compensating pain by corresponding pecuniary profit was too refined for early jurisprudence; but what every one recognised as capable of satisfaction, and what had to be satisfied if the law were to correspond at all to the needs of the people, was the desire for revenge, and the reparation lay in the removal of the sense of shame and the recognised position of personal degradation under which the sufferer remained. What seemed sufficient to accomplish this was the *pæna*, or expiation of the offence. That this was the true ground of the *pæna* is clear enough from the word itself, and the juristic analysis of the later law. And it is apparent also from the nature and order of the penalties attached to the personal injuries. The *talio* and the punishment of death for the offensive *carmina* are inexplicable on the principles that govern modern law, but they become plain enough when we think of them as belonging to a time when the period of self-help and private vengeance had not wholly passed away, and when the action of the State was limited to forcing them into regular channels, and restraining them within bounds which were recognised in cold blood by the rest of the community to be reasonable and moderate.

It would be too much to say that the principle of revenge was confined in its operation to the personal injuries, but in them it was at least the characteristic or even sole motive of the penalty. When we turn to the offences against property (which gave rise to rights undoubtedly penal in the conception of the later law), we find a different motive assuming the leading position, that, namely,



of full reparation or compensation for loss. And in connection with theft we have a term coming into view, that of *damnum*, which throughout the subsequent law ran parallel to and in contrast with that of *injuria* in its strictest sense. The *damnum* exigible in the case of ordinary theft was fixed at double the value of the stolen property. Its most prominent application in the later law was in the Lex Aquilia, where it was fixed at the highest value of the injured property during the preceding year. We find a somewhat equivalent mode of assessment in the Jewish law, that made the destroyer of fields and vineyards restore the loss out of the best part of his own. In all these cases it is quite possible that there was a vindictive element allowed for in fixing the amount of the reparation, but it seems probable that the leading motive was simply to give full compensation. In the cases where a truly vindictive penalty was attached to theft, the cause lay not in the substantive loss, but in the manner of its perpetration or detection. The midnight theft from the fields was probably one of those cases where the sense of its dangerous character affected the whole community, and led them to sanction an extreme penalty. And it seems as if the severe penalty of the *fur manifestus*, the thief caught in the act, came merely in place of the condign punishment that would certainly be inflicted when the owner saw with his own eyes the abstraction of his goods. When the theft had been successfully perpetrated, and no such occasion of extreme provocation occurred, the community, no doubt, thought it reasonable that the injured person should be satisfied with a very full compensation.

The actual infliction of the penalties of death and *talio* must have disappeared at a comparatively early time. Indeed, it is probable that even at the time of the Twelve Tables they had practically fallen into disuse. There is no indication that the action for injuries was prosecuted in a manner different from that founded on any other private right, and it is therefore likely that the judgment was reduced by estimation to a sum of money. Indeed, the law in regard to these vindictive penalties seems to have run much the same course at Rome as elsewhere. The first stage was one of literal revenge against the aggressor and his relations, with which the law interfered no farther than to confine its execution within limits set by the general sympathy and approval of the community. By and by it became the practice to, forego the revenge, often at the instance of friends of both parties, and to permit the slaughter or assault to be atoned for by a fine. Then the penalty was either confined to the money payment, or the offence was brought within the circle of State action; but until one of these two things happened the true right recognised was the actual revenge, and the other was only brought in by the consent of parties or the indirect operation of the forms of law. Precisely the same thing was worked out in Northern law under a different

form. In serious offences no substantive penalty was prescribed, but the aggressor was outlawed under certain forms and conditions, and the avenger was permitted to take vengeance how and where he could, and this continued to be the law until the introduction of centralizing influences. But alongside this apparent severity there came the modifying social influences which most frequently brought about an atonement through fines, the revenge being satisfied by the submission involved in payment; and had this continued to develop unchecked, the whole law of revenge might have passed over, as at Rome, into a system of money penalties.

Under the peculiar semi-legislative power of the Prætors the system of money penalties was fully developed, and in other respects the law rapidly emerged from the narrow boundaries of the early code. It is impossible to speak with certainty or even with great probability as to the historical order of this prætorian legislation, but the general lines are clear enough. The rude classification of the bodily injuries was abandoned, and in its place a general edict of injuries gave a penalty which varied according to the individual circumstances of each case. The old law of the Twelve Tables against *carmina* was replaced by two edicts of wider scope, one of which gave an action for *convicium adversus bonos mores*, and the other for whatever might be done *causa infamandi*. It was a matter of dispute in later times whether these edicts were necessary, as the offences to which they applied fell under the general conception of *injuria*, but it seems likely that at the time they were promulgated the term had not acquired its full sense: the edict that dealt with *injuriæ* in general, in all probability at first applied only to actual assaults, as we find a *utilis actio* for cases in which a blow was merely threatened, and its more extended and subtle use must have been the gradual work of juristic interpretation. One other step was taken, which served to extend the conception of injury, by the edict which gave an action for scourging another man's slave. Whether any other acts were expressly made the ground of an *actio injuriarum* is uncertain and seems unlikely; and we must now see how the law was extended and wrought into a consistent whole by the analysis and interpretation of the classical jurists.

To express the essence of *injuria* in its special sense, as forming the ground of the *actio injuriarum*, the jurists selected the word *contumelia*. In the Institutes it is translated by the equally expressive *ὑβρις*, and both words convey the sense of overbearing disdain of another's person or rights, manifesting itself openly by word or deed. It was conveyed in this by necessary implication, that the act should be expressly directed against a definite person, and this side of the notion was brought out by the expression that the act must be in *despectum personæ*. Of course it is apparent that this is merely the objective side of the spring of action, which gave birth to the first concrete forms of the law. It was the *contumelia*

which gave rise to the feeling of resentment, which in its extremest form found its legal expression and satisfaction in death, or *talio*. And the aim of the penalty is described with equal accuracy; it is *in vindictam*, and not in any sense for the reparation of damage. When damage was done that came within the cognizance of the law, there might be one action for damage and another for injury, if the mischief had been perpetrated with a view to *contumelia*; but the two grounds of action were kept carefully apart, and were never permitted to run into each other. A marked illustration of the radical distinction between the two actions is to be found in the manner in which they respectively affected heirs. The actions that arose out of the delict against property could in all cases be prosecuted by the heir of those against whom they were committed, and to a limited extent even passed against the heirs of the delinquent; but the power of bringing the *actio injuriarum* ceased absolutely with the death of either party. Patrimonial loss affected the *hereditas*, and the claim for its reparation was, therefore, made available to the heirs; but the satisfaction for injured honour could be given only to the sufferer, and its possibility ceased with his life. There could be no *vindicta* for the dead. The jurists then kept faithfully to the leading principles of the old law. They reached by their analysis the ground which formed the common basis of the personal injuries, and appreciated correctly the character of the resulting right. And with the determination of these two points the old causal link of the individual sense of resentment became unimportant, and fell so much into the background, that an injury could be sustained without being felt by the person against whom it was directed. The sole matter for jurisprudence was to determine in what ways *contumelia* could be exhibited; the extent of the *contumelia*, and the consequent amount of the penalties, being mainly left to those who had to decide the individual cases.

What, then, were the acts that expressed disregard or contempt of another personality with sufficient clearness to come within reach of definition by the law? They were fixed by the limits which defined and protected the private life of the individual citizen; whoever broke through them in word or deed committed an *injuria* in the widest objective sense of the word. To use another current phrase, he offended against the *existimatio*, the position and consequent rights which were implied in citizenship; and Cicero points to the same thing when he terms *injuria*, *dolorem imminutæ libertatis*, for it was a breach of the freedom and immunity from interference which the State secured to the individual. In order to bring every such transgression within the scope of the *actio injuriarum*, there needed only the personal aim which was essential to *contumelia*. It was not sufficient that the invasion of another's rights took place by mere negligence or even with a purpose, which though lawless was not directed against the person who was injured. The injury had to be inflicted for the sake of injury *causa injuriandi*.

or *causa contumeliæ*. Hence the delicts against property, even such a one as robbery, did not as a rule imply *injuria* in this technical sense. The intention of the thief, for example, was merely to abstract the property, and in the cases which are suggested under the *Lex Aquilia*, which gave rise sometimes to an action for injury as well as one for damage, the ground of the *actio injuriarum* is not the damage to property, but the fact that it has been done with the primary purpose of injuring or insulting the owner. Hence, also, the blow given in joke was not regarded, and what looks stranger at first sight, neither was the blow given in conflict *dum certat* nor the abusive words *in rixa*. The jurist considered that the mere ebullition of passion under such circumstances was a thing distinct from *contumelia*, and therein they concurred with Aristotle, who tells us that the equivalent *ἔβρις* is distinct from and incompatible with *θυμός*.

The cases of injury fall into three divisions which group themselves naturally, and probably historically, round the general edict of *injuriæ*, the edict against *convicium*, and the edict against what was done *causa infamandi*. The first and plainest mode in which *contumelia* could be exhibited was by contempt of those rights which were secured by the ordinary law, and it was these which were included in the first general conception of *injuria*. But, besides those rights in the strict sense, the citizen had others of a somewhat more indefinite character. He was entitled to claim that respect in the public social life which was sanctioned by the *bonos mores* of the State. Wherever those forms of social life were intentionally violated *contumelia* was shown as distinctly as by the disregard of the ordinary rights of law. Lastly, he was entitled to the fair judgment of his fellow-citizens, and therefore everything that was done for the purpose of distorting that judgment in the case of the individual, everything that was done *causa infamandi*, fell also under the general conception of *injuria*.

Little need be said as to the cases falling under the first section. They included every personal assault and every interference with the rights over external things, and in most instances the contumelious motive was clear from the act itself, although that as a point of fact would always have to be determined by the judge. The other class of cases are more important to us, as they are the only ones that have affected our modern law.

The most notable instance of the second class of cases, those which were founded on a breach of the law which governed the public social life, was the *convicium*; and its character deserves close attention, from the curious and confusing use which has been made of the term in Scotch laws. Its meaning is plainly expressed by Ulpian (D. 47, 10, 15, § 4, 5): "*Quum in unum complures voces conferuntur convicium appellatur quasi convocium. Sed quod adjicitur Prætor; adversus bonos mores: ostendit non omnem in unum collatum vociferationem Prætorem notare sed eam quæ bonis moribus*

*improbatur quæque ad infamiam vel invidiam alicujus spectaret;*" again (§11): "*Apparet non omne maledictum convicium esse sed id solum quod cum vociferatione dictum est;*" and (§12) "*Sive unus sive plures dixerint quod in cætu dictum est convicium est quod autem non in cætu nec vociferatione dicitur convicium non proprie dicitur sed infamandi causa dictum.*" It was clear from this that the *convicium* was nothing else than public loud abuse or proclamation of something that might tend to infamy or detraction. Whether it was true or not was immaterial, or might at most affect the amount of the penalty; the essence of the offence lay in the public affront, and whether that was sufficiently serious or not to form an action was determined by reference to the *bonos mores* of the community.

The third class comprehended those cases where the essence of the offence lay not in the external form, but in the falsity of the impression conveyed by the act. The *convicium* was an open breach of the law which regulated the public social life, but there might be nothing in the form of the defamation which wore the appearance of illegality, the offence lay in the false impression produced, and the resulting unwarrantable depression of character. The direct object of the attack was what was called the *opinio*, the actual judgment that was formed upon each individual citizen, and which his fellow-citizens were entitled to form and express in any way that was not *adversus bonos mores*. We find many modes stated in which this false impression might be produced, but we need only attend to the simplest and to us the most important,—what we now understand by defamation. Two points require to be especially noted in order to bring out the relation of the Roman law of defamation to our own. The first and most essential condition lay in the falsity of the statement. If the *infamatio* were well founded, no man could be blamed for it but he who had contracted it by his acts. Of course we might easily conceive the law to have stood otherwise. We could quite understand how it might be a breach of *bonos mores* to spread true statements which deeply affected a man's fame with such superfluous industry as to give them unnatural prominence in the public mind. But this was not the case. When the statements were true, nothing short of the public insulting proclamation which constituted the *convicium* was sufficient to form a ground of action. That this was so is clear enough from the few texts which relate to the subject. One of these we must especially notice from the erroneous use which has sometimes been made of it. Paulus says (D. 47, 10, 18), "*Eum qui nocentem infamavit non esse bonum et equum ob eam rem condemnari; peccata enim nocentium nota esse oportere et expedire.*" From this text, taken by itself, we might perhaps infer that the essence of the *infamatio* was not wholly destroyed by the truth of the statement, but that the real explanation was, that in certain cases a general rule that forbade defamatory statements, whether true or false, was superseded by a higher law of expediency which permitted, and in-

deed required the spreading of statements which were hurtful to character when such a proceeding might tend to the public good. This plausible-looking interpretation seems to have affected the minds of the judges in some Scotch cases, but it is irreconcilable with a distinct passage in the Code (c. 9, 35, 5), "*Si non convicii consilio te aliquid injuriosum dixisse probare potes fides veri a calumnia te defendit*" (see also h. t. 10). We must conclude that the truth was in all cases a complete defence, and that the reason given by Paulus was merely one of those supports given to an established rule of law from general considerations of expediency, with which we are not unfamiliar in more modern cases, and which serve only to obscure the real grounds and nature of the rule.

The other necessary element of defamation to which special attention is required is that personal motive which has been already stated to be essential to every case of *injuria*. The most familiar expression for it is the *animus injuriandi*, a phrase, however, which is scarcely used by the classical jurists, who prefer designing the act as done *causa contumeliæ*, or with reference to the special case *causa infamandi*. We are not concerned of course here with the mode of proof. In many instances the nature of the act itself might afford sufficient evidence of the intention, in other acts of a dubious character it might be necessary to have recourse to other evidence, but at all events the motive was always a necessary question of fact, and seems never to have been dealt with as a presumption of law. An illustration of the mode in which the absence of this motive was a sufficient answer to a charge of defamation is to be found in the passage we have quoted above from the Code, when the *fides veri*, the belief that the statement propagated was true, is held to destroy the essence of the offence. And another may show still more clearly how far the Roman law went in requiring the injury to be done *causa injuriæ*. If an astrologer or diviner declared that a person was a thief there was no *actio injuriarum* against him. He could be punished for exercising an unlawful trade, but this very unlawful aim was sufficient to clear him from the intention of defamation.

We have confined ourselves to the chief features of the private delict, partly because it was the leading and most characteristic form which the redress of injury assumed in the Roman law, and partly because it is to it that the jurisprudence relates which has influenced our modern law. But even at an early time certain injuries were singled out by special legislation for severe punishment, and towards the close of the classical period there are indications of a tendency to break up the general delict into special offences, and to approach more nearly to the view of preventive punishment. With these, however, we need not concern ourselves, and we now pass to the corresponding Scotch law.

We have never had in the law of Scotland any precise equivalent to the *actio injuriarum*. What has been generally known under

that name presents certain important differences both in its character and extent. Its scope was limited to those cases which in the Roman law fell under *convicium* and defamation, while the real injuries were for the most part dealt with by the public criminal law. The peculiar character and extent of the Roman action was due to causes which were not operative in Scotland. It arose partly from the unbroken development of the early law of personal injuries, by a process of interpretation which was favoured and indeed made possible by the long-continued prominence of the private delict. But it was partly also due to the political and social characteristics of the Roman people. Their profound respect for external position and dignity guided them naturally to *contumelia* as the chief characteristic of those offences which in other countries the law, when the old vindictive point of view was lost, either regarded as giving a private right to compensation for loss and pain or punished as dangerous to public safety. And, in concurrence with this, we must remember the complete subordination of the citizen to the State, which brought within the cognizance of the law those social relations and offences which in the modern European nations were regarded as purely personal. At the time when jurisprudence may be said to have arisen in Scotland the state of matters was wholly different. The most of the personal injuries were separately recognised and punished by the criminal law, while the honour and dignity of the individual were, as in most contemporary nations, under his own charge, and could be best maintained in the public view by his personal action. In fact the place of the Roman law of injury was really occupied by the law of honour; it was by it, and not by the State, that his *existimatio* was defined, and when injured by *contumelia* he had to seek redress not from the law but at the hands of his assailants. The only case when the law stepped in for the vindication of honour was when the offence touched the officers and magnates of the State.

The way by which any part of the law of injury was introduced into Scotland was through the Ecclesiastical Courts. These Courts, besides their well-known jurisdiction over rights which were either directly ecclesiastical or arose under the sanction of the Church, claimed, and in some instances obtained, a very extensive jurisdiction over matters which pertained to morals. They were *Curiae Christianitatis*, and therefore endeavoured to punish those offences which, although not falling within the province of the civil law, were yet contrary to the precepts of religion. Such a case was presented by scandal or defamation, which they claimed a right to punish nearly everywhere, and which in Scotland was expressly acknowledged to be within their jurisdiction. For this offence it would appear that their original and proper punishment was the *palinode*, which was a form of public retractation and repentance, and which served the double purpose of punishment and reparation.

They also, however, made use of fines, payable either to their own procurator or to the person defamed, and these latter in course of time came, in conformity with the analogies of the secular law, to be regarded as damages or solatium, although they were in their origin strictly penal. The proper law of these Courts was, of course, the Canon law, which, in the matter of scandal, had borrowed its definitions and phraseology almost wholly from the Roman law, and it was to this latter they had recourse when they had occasion to look further than their own customs and precedents. It may be said, then, that in the case of defamation the Commissary Court gave a remedy which was closely analogous, if not practically identical, with the *actio injuriarum*. It is true that there were considerable theoretical differences, but these scarcely affected the practical result. Although, in later times, the fines awarded by the Court were given chiefly in name of solatium and damages, yet the general penal character of the action remained unchanged. The libel charged the scandal as a crime and offence, the form of punishment was preserved in the palinode and the fine to the procurator, and under whatever name the fine was awarded to the injured person, it no doubt served equally well the vindictive purpose. The doctrines and terminology of the Civil law could thus be applied in this Court, without confusion arising from any essential difference in the ground of action or the character of the penalty, so long, at least, as questions of patrimonial loss or wounded feeling merely affected directly the amount of the fine.

In the earlier authorities of the Scotch law the exclusive competence of the Commissary Court to the action for scandal was distinctly recognised. The Court of Session regarded it as a matter entirely beyond their concern, and the Court of Justiciary, whose multifarious and sometimes eccentric activity scarcely left anything untouched, seems only to have taken cognizance of it in a few cases of an extraordinary and aggravated character. When the Court of Session entertained actions of defamation they rested on grounds of a totally different character. Stair (I. ix. 4) says that "fame, reputation and honour are also in some way reparable. Firstly, by making up the damage that is inferred in men's goods by the hurt of their fame, whereby their gain ceaseth in that being repute such persons they are disenabled for their affairs. Such actions upon injurious words, as they relate to damage in means, are frequent and curious among the English; but with us there is little of it accustomed to be pursued, though we own the same grounds, and would proceed to the same effects with them if questioned. Secondly, damage in fame or honour is repaired by homage, acknowledgment and ignominy put upon the delinquent. Thirdly, by equivalent honour and vindication to the injured." The last two remedies mentioned either refer to the Ecclesiastical Courts or to private personal vindication of honour; the first describes the strictly legal remedy, as recognised by the Court at that time, and



indeed for long afterwards. The action competent before the ordinary Courts, which is thus described by Stair, is evidently completely different from the *actio injuriarum*, and is indeed strictly analogous to the action for *damnum injuria datum* of the Lex Aquilia. It was founded on patrimonial loss, for which it was intended to give reparation, and, properly speaking, took no cognizance whatever of any other ground of action. One very important consequence of this distinction was, that the *dolus* or *animus* which was essential to the *actio injuriarum*, and was recognised as necessary in the Commissary Court, had here no proper place. In accordance with all the analogous cases of reparation for patrimonial loss, *culpa* was quite sufficient. Had the two actions, therefore, been kept apart, we should have had one founded on the mere fact of defamation with the *animus injuriandi*, and another founded on injury to means and estate, for which *culpa* alone was necessary.

But in point of fact these actions were not long kept separate. In both cases the law was determined ultimately by the Court of Session, which reviewed the judgment of the Commissary Courts, and had naturally a tendency to apply the same principles to both actions ; and there was a common element in both sides which helped their assimilation. The Commissaries from the first had the element of solatium growing out of the money fine, and the Court of Session were also familiar with the remedy in its application to other details. They were also inclined to give greater scope to actions resting on wounded feelings, in accordance with the growing disposition to discourage every form of private vindication, and to provide instead a remedy at law. Hence, it is not a matter of much wonder that before long they lost sight of the exclusive jurisdiction of the Commissaries, and began to entertain the action for solatium in their own Court. The original jurisdiction of the Court is first clearly sustained in the case of *Auchenleck v. Gordon* (March 4, 1755, M. 7348), and after some wavering the matter was set finally at rest in *Wilkie v. Wallace* (Feb. 15, 1765, M. 7360.) In this case the question of jurisdiction was formally raised, and the action was thrown out by Lord Kames, who thus reports the subsequent reversal of his decision : " I was clear for sustaining the declinature, for though damages for repairing a patrimonial loss came under the jurisdiction of the Court of Session, yet there is no patrimonial loss specified, and the damages libelled are only for assythemment or solatium, which, with regard to verbal injuries, come within the cognizance of the Commissary Court, which is declared law by all writers. The only reason given was, that in several late cases of the same kind action had been sustained in this Court in the first instance, and it was now too late to retreat." The Court of Session, however, while thus assuming concurrent jurisdiction with the Commissaries in every case of defamation, whether attended with patrimonial loss or not, did not attempt to give a remedy which was formally penal. It is true that cases were brought before the Court in

the form of the criminal libel, in which the ground of action was described in the major as an offence of a high nature (*Hamilton*, Aug. 10, 1771, M. 13,924), and conclusions were even inserted for fine and palinode; but they never gave effect to their conclusions, and the right of action before the Court was thus for damages and solatium for the loss and wounded feeling which were the consequences of the defamatory act. But, while thus depriving the action for scandal of its peculiar features, and permitting it to be pursued before them only as it was termed *in civilem effectum*, they were under the persuasion that they had taken over the *actio injuriarum*, and that they were therefore bound to pay some regard to the civil law doctrines on the subject. In effect, the action for solatium did closely resemble the *actio injuriarum*, and might indeed be said to apply the same remedy under a different name. The wounded feeling is apt to resolve itself into *contumelia*, and the solatium looks extremely like the vindictive penalty in disguise. Except, therefore, in a few outlying cases the different modes of expression did not seriously affect the practical result, and the name of the action was no great misapplication. Remaining in the belief that they were dealing with the *actio injuriarum*, they found it impossible to get rid of the *animus injuriandi*, which remained persistently sticking in their authorities, and from the same source they were in constant trouble about the *veritas convicii*. These two questions form the battle-ground in every case of defamation that turns up during the century prior to the establishment of the Jury Court. In considering them we may use indifferently the cases originating in the Court of Session and those brought by review from the Commissary Court, as both were dealt with under the same law, so far as the grounds of action were concerned—the peculiarly criminal remedy of the Commissary Court coming to be of little consequence and being easily kept apart.

The difficulty sometimes experienced in the case of the *animus injuriandi* arose from the mixed conclusions for solatium and damages, but although it formed the subject of frequent discussion, the Court on various occasions indicated a pretty distinct rule on the matter. When the action resolved itself into a claim for solatium, and no patrimonial loss was alleged, the *animus injuriandi* was always requisite. The Court held an action of this sort to be the *actio injuriarum*. Wherever, therefore, the circumstances of the case showed nothing more than indiscretion, or when the relation of the parties was such as gave rise to what we now call privilege, the action failed from want of the necessary *animus*. In no case does it appear that the *animus* was a presumption of law from the nature of the defamatory statement itself. The question was always one of fact, and though in some cases it might be held that the statement taken by itself, and without sufficient explanation on the part of the defender, formed sufficient evidence of *animus*, yet the whole circumstances of the case were always open to the consideration of the Court. An illustration of the mode of treatment

may be found in *Rose* (May 26, 1803, Hume, p. 614), an action based upon the circulation of undoubtedly defamatory reports against a clergyman. It appeared that there was nothing worse in the case than a mere love of gossip, and the Court thought "that the whole circumstances of the case did not indicate an *animus injuriandi*, or active malice, and that she was not responsible in law for a piece of idle and transient indiscretion from which no prejudice had ensued." The case of *Thom v. Cameron* (1813, Hume, p. 646) is interesting on this point, as it looks at first like a transition to the point of view that the *animus* is a necessary inference of law from the statement being false and injurious. In that case the defamation was a serious one in its possible consequences, and three judges (in opposition to a minority of two and reversing the judgment of the Lord Ordinary) delivered opinions that in some passages seem to indicate that they considered the *animus* to be necessarily implied in a statement of the kind. But a closer examination shows that they were much influenced by the exceptionally injurious character of the defamation, and further, that they by no means disregarded the extraneous circumstances of the case. When, however, the action was based on patrimonial loss, the rule was different. It was stated clearly in the case of *Græme v. Skene and Cunningham* (March 3, 1765, M. 13,923). "An *actio injuriarum*, where there is no patrimonial loss, and where the damages awarded are only in solatium, must be founded upon *dolus malus*, according to the opinion of all writers upon law, and so far it differs from damages awarded to repair a patrimonial loss, in which it is sufficient to specify even *culpa levissima*." The same distinction is alluded to by the President Blair in the case of *Craig v. Hunter* (June 29, 1809, Borthwick, App. p. 384). "In the proper action for scandal *animus injuriandi* is requisite. True, there may be ground for a process of reparation (though not strictly for scandal) even in a case of error attended with no wrongful purpose." These distinct statements might be confirmed by numerous more indirect allusions in other cases.

The question of the *veritas convicii* was much more troublesome, and was never very distinctly settled. The confusion first arose from an inexplicable misunderstanding of the term *convicium*, which, as we have seen, was quite distinct from defamation, and meant the publication of injurious or insulting statements, whether true or false, in an unwarrantable and offensive manner. It was to this that the maxim applied, *veritas convicii non excusat*, which obtained so great currency in Scotland. But the Scotch lawyers unfortunately applied the term *convicium* to every case of defamation, and therefore were in danger of the monstrous conclusion, that every statement injurious to character might be made the occasion of solatium or damages without regard to its truth or falsity. To escape from this, they had recourse to the unlucky expedient of drawing a distinction between the civil and criminal actions, and

declaring that the maxim applied strictly only to the last. This distinction is first clearly stated in the case of *Hamilton*, and is frequently referred to afterwards. How it came to be adopted is difficult to conjecture, but if we may guess from the pleadings in *Hamilton*, it came partly from the English law of libel, and partly from a view that the *convicium* was especially connected with the *animus injuriandi* which formed the basis of criminal actions. Of course, in the civil law there was no foundation for such a distinction, the difference in the application of the *veritas* lying in the character of the act and not of the remedy, and there seems to have been as little ground for it in the older Scotch law, so far as can be seen from the scanty records of the early cases.

But, although the way was thus made clear for permitting the proof of *veritas* in civil actions, it was only allowed with much difficulty and under considerable restrictions. This partly arose from the continued influence of the old maxim, which many of the judges were inclined to connect with the *animus injuriandi*, and to apply in every case when this was distinctly shown, and partly also from the feeling that there was a real distinction to be drawn in cases of defamation which afforded substantial grounds of expediency in regulating its application. In the case of *Hamilton* (1771) the proof was refused, but there were distinct indications that the judges were wavering on the matter, and would probably have in the end allowed it had they not been hampered by a previous interlocutor. In the subsequent cases of *Chalmers* (Feb. 22, 1785, M. 13,939) and *Peat* (March 6, 1793, M. 13,941), both ordinary cases of defamation, the proof was allowed; but in the case of *Scotlands v. Thomson* (Aug. 8, 1776, M. 13,934) it was distinctly refused. The latter was a case of defamation from the pulpit, and therefore could be distinguished from the others by the mode of publication. To pass over some cases of little consequence, we come to three in which the point was specially discussed, and in which nearly all the judges expressed their opinions. These are *Thomson v. Gillie* (May 16, 1810), *Macdonald v. Macdonald* (June 2, 1813), and *Dyce v. Kerr and others* (July 9, 1816). From these cases we can gather pretty clearly the general drift of the law, although there were very considerable differences of opinion. In the first case the Court allowed a proof of such statements as might have been made without any *animus injuriandi*. In the second case the proof was allowed, and in the third refused, and in both instances the opinions of the judges, with the exception of the Lord President Hope, whether in the majority or minority, are much in accordance with the judgment in the case of *Thomson*. None of them commit themselves to the doctrine that proof of the *veritas convicti* is to be allowed in every case, and indeed almost all of them distinctly repudiate such an idea. The distinction to which most of them pointed was this, that wherever the injurious statement was made from purely

malicious motives, the proof of *veritas* was to be refused, or at the most allowed only for the sake of alleviating the damages. Others suggested a distinction akin to that in the Roman law, that there were cases when damages were due on account of the manner and extent of the publication. Had the latter view prevailed, we should have had a class of cases resting on a principle similar to the *convicium*, and distinguished like it from the simple case of defamation. Had, on the other hand, the former view prevailed, we should apparently have had the proof of *veritas* refused in every case of the *actio iniuriarum*, and allowed only in cases founded on patrimonial loss. It is scarcely, however, likely that it would have been carried so far, and it is more likely that the rule would ultimately have rested on a distinction drawn from the mode or extent of publishing the defamation.

Summing up, then, the leading principles of the law as recognised in the Court of Session prior to the introduction of the Jury Court, we may say that two actions, or, to use stricter language, two obligations *ex delicto*, might arise from defamation, one for reparation of patrimonial loss, and another for solatium. To ground the first of these *culpa* was alone necessary, and the truth of the statement was admitted as a complete defence. For the other it was necessary to prove the *animus injuriandi*, which might be inferred either from the defamatory act itself or from extraneous evidence, but in every case was determined as a matter of fact, and not as one of pure legal inference. With regard to the effect of *veritas* in this latter case, it is, as we have seen, impossible to state with precision any rule; but it is at least certain that the Court, although differing widely as to the extent to which it was admissible, were on the whole pretty well agreed that there were numerous cases in which it formed no sufficient defence.<sup>1</sup>

It is needless to point out that this differs materially from what is understood to be the existing law. The *animus injuriandi* is now apparently presumed by law from the false statement, except in those cases where the presumption is rebutted by a case of privilege. The distinction between the reparation for patrimonial loss and solatium has disappeared, and has indeed, from the *animus* being now a matter of legal presumption, become inapplicable, except in cases of privilege, where it would not probably be listened to. And, lastly, the plea of *veritas* is now a complete defence in every case. For these changes we are probably indebted to the English law, which naturally exercised a very large influence over the early decisions of the Jury Court. The English law of slander, and the action in the case for libel, was clear, and decided upon the treatment of malice and *veritas*; and the Scotch law, on the other hand, was on many points obscure, and in isolated cases

<sup>1</sup> See as to this the opinion of Lord Jeffrey, expressed in a letter to Hazlitt, who was at that time meditating legal revenge upon Blackwood for an article in the *Magazine*.—*Constable's Correspondence*, ii. p. 220.

or expression might easily be supposed to be the same as in the South country; hence it came that the English lawyer who presided over the Jury Court quite naturally had recourse to the expressions and doctrine with which he was familiar, and which did not seem to him to differ from the Scotch law, although some of his statements would have seemed very strange indeed to the previous generation of Scotch judges. The chief loss we may have sustained from this is best suggested by the consideration that the Scotch law has been placed on the same footing as a single department of the corresponding English law. The English criminal action for libel provided a remedy for the most important of those cases which the Scotch judges would have dealt with by refusing a proof of the *veritas convicii*. By far the most serious cases of defamation are those which take place through the wide publication obtained by printing. So far as these rest on false statements, we are able to deal with them by our present action, though whether in every case the civil remedy is quite satisfactory may be doubted. But when the statements are true, and the offence—often undeniably serious—rests upon the unwarrantable pain and insult which has been inflicted by dragging matters into publicity that related purely to private life, we have no law that will serve us. The Romans dealt with the form of publication current in their days, by punishing the *convicium*; and in almost every country in Europe the law provides a criminal remedy. In our older law, as we have seen, the Court refused in such cases to permit any proof of the *veritas*, but, so far as appears from the most general and authoritative statements of the present law, we can now deal with such cases in no shape whatever. Of course there is a good deal to be said in favour of free public discussion of everything, and hitherto we have not suffered much from wanting the means of punishing the abuse of it, but still it is a matter for serious consideration whether we have not managed to leave a gap in the law which may some day be felt. Whether we ought not to go farther, and provide a criminal or quasi-criminal remedy in every case, is a doubtful matter. It would, no doubt, in many cases be simpler and more scientific than our present mode of reaching the same end indirectly by giving solatium. Compensation for wounded feelings must always be somewhat difficult to assess, and in nine cases out of ten means a vindictive penalty. But perhaps we may on the whole rest content with the simplicity of the present mode of proceeding. When the defamation comes within the sphere of legal remedy, we simply let loose the jury upon the culprit, and we may feel tolerably certain that they will be guided by the *bonos mores* of the community, and inflict a proper penalty for the breach of them, whether we choose to call it punishment or solatium.

## JUDICIAL STATISTICS 1873.

## THIRD ARTICLE.—LOCAL COURTS.

THIS section of the Statistical Report commences with a comparative table (p. 77) of the business in the Sheriff Ordinary Courts in the following years:—

Number of Causes within the years	1870.	1871.	1872.	1873.
1. In dependence at commencement	1904	1771	1775	1801
2. Initiated within the year .	7259	6836	6835	6599
Total .	9163	8607	8610	8400
Final judgments within the year .	5977	5376	5362	5166
Taken out of Court .	1417	1456	1448	1322
In dependence at end of the year	1769	1775	1800	1912

These statistics show how uniform is the working of the judicial system in the Sheriff Courts. The table separates the "*final judgments*" between those *in foro* and those in absence; but the last cannot be thus classified under the character of final judgments. It thus appears that of 5166 of so-called *final judgments* no fewer than 3220 were mere decrees in absence, leaving only the small remainder of 1946 for judicial determination. So infinitesimally minute and scrupulous is the statist, that, by a footnote under the year 1873, the reader is warned that, of the number of 1801 causes in dependence at the commencement of the year, one unfortunate unit had been omitted to obtain a place in the proper niche of the previous year. This hyper-conscientiousness is often afterwards repeated, though such insignificant omissions do not in the least disturb the general results. One important department of this comprehensive table is for the first time given under the year 1873, being the result of appeals from Sheriffs-substitute to Sheriffs. The number of appeals is set down at 718, of which *appeals* it is said 517 were *sustained* (meaning assuredly the reverse—that the judgment of the resident Sheriff was affirmed, and the appeal *not* sustained), whilst 127 were "reversed," and 74 had "mixed judgments." Besides these judgments by the Principal Sheriff on appeal 24 are reported as judgments given directly by himself. The judgments given by the Sheriffs-substitute in 1873 are set down at 1204. A number of other somewhat important matters are only reported for the year 1873, the three previous years being in blank. There are therefore no materials for comparison between these successive years. This is explained by a note to the effect that, "on 8th November 1873, Lord Advocate Young certified under the Act new forms for the returns of the civil business, separating the administrative from the judicial business of Sheriff Courts." This additional column under the year 1873 gives the following results:—

## APPLICATIONS UNDER THE

1. Bankruptcy Act . . . . .	1853
2. Poor Law Acts . . . . .	685
3. Lunacy Acts . . . . .	2152
4. Registration of Births, etc. . . . .	590
5. Master and Servant Act . . . . .	549
6. Service of Heirs . . . . .	603
7. For appointment of Tutors and Curators . . . . .	39
8. Prisoners for alimant . . . . .	110
9. Sanitary Act . . . . .	114
10. Shipping Act . . . . .	50
11. <i>Fugae</i> Warrants . . . . .	120
12. Lawburrows . . . . .	19
13. The Court poor roll . . . . .	1238
14. Decrees in absence <i>from</i> (?) Ordinary Court . . . . .	3220
15. Admission and Suspension of Sheriff Officers . . . . .	50
16. Miscellaneous applications (?) . . . . .	1207

There are many important points brought out by these details. The figures under the first line (1853) cannot mean the number of mercantile sequestrations within the year, but must include sundry subordinate applications in that process. If the 2152 returned under Lunacy Acts mean original applications, there is a most startling fact for consideration in the enormous increase of mental malady within the year. The number of legal paupers imploring gratuitous litigation, set down at 1238 in one year, is a matter of deep interest, and it would be well that the fact of admission or rejection should have been also noticed. The contrast of this legion with the four who only pleaded at the pauper gate of the Supreme Court is very startling. It is believed that the great majority of these forensic paupers in Sheriff Courts are mothers of illegitimate children desiring to prosecute the putative fathers, possessing generally nearly the like qualification to defend in the same humiliating class as the mothers. It is important to notice the frequent recourse had to the summary jurisdiction now established for the settlement of trade disputes between master and servant. It is not obvious how decrees in absence already reported under the judicial department should reappear as part of the administrative business, as *coming "from the ordinary Court."* The number of *Cessiones* is reported during the years

1870.	1871.	1872.	1873.
—	—	—	—
at 173	133	133	154

showing a remarkable uniformity, notwithstanding the oft variation in trade. We pass over such apparently uninteresting details in this table, as the "*character of causes,*" (the character being whether they enter the portals "by summons," or "*otherwise than by summons;*") and whether in decrees *in foro* "costs were



taxed or otherwise fixed," or "where costs refused to both parties," or "where amount of costs entered in process." We venture to doubt the accuracy of these results. It is no indication of the general rule that costs should follow an adverse decree, as "shadow follows substance," when it is thus reported, that of 1946 judgments *in foro*, in no fewer than 1129 costs "were refused to both parties."

A second table (p. 78) gives the division of the aggregate of the business reported in the general table amongst the 34 Sheriff Courts of Scotland. The highest number of cases instituted within the year 1873 is 1358, and, as might be expected, is attached to the great metropolis of the West. The lowest is at Cromarty, with only nine cases. But no less than 18 other Courts show less than 50 cases instituted within the year, defended or undefended. This certainly goes far to support the recommendation of the "Commission on Law Courts" for an amalgamation of certain local Courts of small business. The oldest lingerer on the Rolls is put down to the debit of Edinburgh, having entered judicial life in 1862. This table of vital statistics generally shows favourably to the despatch of business.

The intense thirst for exactness is here exemplified by a Clerk who reports two cases in dependence at the commencement of the year; with praiseworthy desire for the fair fame of his tribunal, apologizing by note attached, that last year he ought to have returned the like number of two in life, but unfortunately had disparaged his Court by returning only one.

A third table (p. 80) gives the result of cases, distinguishing judgments in absence and *in foro*, and the years of the nativity of each case. It is shown that, of 6488 cases brought into Court, 3220 were undefended. In two Courts the whole business was, in one to give 6 and in the other 7 decrees in absence, and no case was defended! This is one of the tables which takes up large space, must have required great labour in preparation, yet its value is absolutely *nil*.

A fourth minute table (p. 82) gives the particulars of judgments *in foro* in 1873, showing 1204 judgments by Sheriffs-substitute, and 718 by Sheriffs-principal on appeal. One curiously worded table shows "Longest period between date of Sheriff-substitute's *possession of completed* process and date of judgment." Whatever be the meaning of this strange nomenclature, the period calculated in weeks shows no great waste of time, with the exception of Linlithgow, where an interval of 56 weeks, or considerably more than a year, is set down as the interval. The statist, not satisfied with these general results, expands his passion by a columnar table extending from one week to 56 weeks, though the most of these nicely prepared columns find only one entry, and two actually stare in vacancy.

A fifth table (p. 84) still pursues the analysis of procedure in contested cases. Some important facts are however here given. Of 1922 causes or judgments given by Sheriffs-substitute *in foro*, in 1069 there was no appeal to the principal Sheriff, and in 853 there was that step

once or more. But the subsequent columns must include "interlocutors" under the term of "judgments." It is shown that, counting repeated appeals, there were no fewer than 1174 appeals, there being no fewer than 4 appeals six times repeated, and three cases in which there were more than six, but how many more is wisely concealed. These prolific appeals and consequent stoppages are placed against Glasgow and Hamilton, arising perhaps from the easy and cheap access to the Judge of Appeal. The result of the 718 appeals are given—"appeals sustained" (meaning judgments affirmed) 517, 127 reversed, and 74 with mixed judgments. In Aberdeen district 19 judgments are reported as sustained, 22 are reversed, and 6 obtained mixed judgments. The frequency of appeals were reprobated by the Law Courts Commission, and their restriction was recommended.

Another table (p. 86) prosecutes the tedious analysis of judgments *in foro*, to show "the number of weeks between Sheriffs' possession of completed cause and date of judgment." The broad-sheet provides for spaces to entomb the interval from one week and under up to forty-seven weeks. The Sheriff of Ayrshire is debited with the largest period, or 47 weeks. It is matter of congratulation, that of 718 causes 517 received their *quietus* within one week. This table enters into the question of costs. Of 1946 causes neither party were awarded costs, whilst costs were given in 1129, and in the remaining 383 the question of costs appears not to have arisen.

The total sum of costs awarded in all the cases combined are given, which can be of no earthly use except to rouse questions of apparent discrepancy. Thus the *cumulo* costs in Aberdeen in 90 cases are set down at £1006, whilst Glasgow, with 230 cases, only reports £2479 as the total amount of costs awarded. The costs thus given in the gross give no reliable *data* as to the expense of litigation in any particular Court. In the Reports of former years the highest and lowest sum awarded were reported. But this too was of no practical avail, as a case of small value with an expensive proof might occasion an expense far exceeding one of far greater value where, the facts being admitted, the decision turned on a question purely of law.

The next table (p. 88) contains the statistics of the administrative business of Sheriff Courts, and, though unnecessarily subdivided, is of some practical importance. It records 309 sequestrations, 88 being in Glasgow. Of appeals against resolutions of creditors there were within the year 14, and 32 against deliverances of trustees. For relief of paupers 424 applicants, and in all, under the administrators of the poor laws, 685 cases.

The next two tables (pp. 90 and 92) allot to each county the procedure under the Lunacy Acts, the Registration Statutes, and the various other statutes which yearly devolve new duties on Sheriffs; and another table (p. 94) renders the same allocation with cases of *Cessio Bonorum*.

That anomalous and nondescript section of judicial business under the name of the "Debts Recovery Court," fills up another great section of the Blue Book (p. 95). But this is a name applicable to almost all the sections of the Court. By this table it appears that within the following years

	1870.	1871.	1872.	1873.
There were brought of new cases,	3634	3407	3289	3318
Decrees in absence, . . .	1845	1860	1596	1709
Decrees <i>in foro</i> , . . .	882	818	780	725
Appeals to Sheriffs-principal, .	203	210	176	168
Whereof affirmed, . . .	140	157	147	112
" altered, . . .	48	45	31	40
Appeals to Court of Session, .	5	5	3	4

A number of other particulars are added of no great practical value. The following table (p. 96) allocates the cases in this *side-Court* amongst the various local Courts, with the amount of the debts claimed, with other minute particulars, which are fully supplemented by other three tables (pp. 98, 100, 102), which must have cost an enormous amount of labour to compile, and which seem of no practical avail whatever. This heterogeneous department of the Sheriff Court appears to be a special favourite with the statist, for he has painfully analyzed, or rather anatomized, its every nerve far more than with the ordinary Court, where the mass of the real business of the country receives its judicial administration.

The next division of the Returns which claims attention is the Sheriff Small Debt Court, which also appears a pet favourite of the statist, as no less than seven large folios are devoted to its minutest details. The first table (p. 105) being a comparative table for five years, gives all, and more than all, that the most morbid curiosity could desire, for the years

	1870.	1871.	1872.	1873.
Primary enrolments within the years (meaning new causes) . . .	59,741	47,524	42,097	42,140
Debts claimed . . .	£197,567	£161,904	£142,448	£144,925
Decrees in absence . . .	36,080	27,794	23,755	23,813
Decrees <i>in foro</i> . . .	14,811	11,408	10,075	9,735
Total fees received . . .	£7,800	£6,393	£5,599	£5,750

This table contains a great deal more, the obtaining of which must have occasioned an untold amount of trouble, and is so perplexing, that we greatly doubt its accuracy in many particulars, and have no doubt of the utter worthlessness of the details when obtained—such as "the amount claimed and decerned for," and "the amount not decerned for;" transformed again into "decrees

allowing full claims" and "allowing partial claims;" and in a third view "disallowing the whole and disallowing part;" and lastly and more wondrous, where "the whole claim has been disallowed in absence and when *in foro*." At first sight it is not very easy to perceive how a pursuer could have been disallowed his whole claim in absence and without hearing parties, unless the Sheriff had by some medium obtained a supernatural knowledge of the true state of facts. The second table (p. 106) parcels the Small Debt business amongst the various Courts, giving all the microscopic divisions and subdivisions massed in the first table—but only for the year 1873. Glasgow, as might be expected, gives the largest number, 14,049; Edinburgh following with 3,212; while some district Courts give 5, 4, 2 and 1 causes as the whole extent of their judicial work, whilst two Courts rejoice in a "clean bill," and, as we hope, obtained their "white gloves." Two additional tables (pp. 108 and 110) painfully pursue the anatomy of the first table to the very atoms of each trifling case, and add some additional points, such as the result of poindings and sales, with the expense and surplus, but omit imprisonment on decrees for sums above £8, 6s. 8d., but give the "number of days of Court sitting." We submit whether the hours might not be called for next year to complete the information. It could easily be shown, by a comparison of the figures, that in many instances the collectors have unquestionably mistaken the character or nature of the inquiries, as it will be found that some of the columns directly contradict their neighbours.

One general remark on this department of the Sheriff Court arises from the facts disclosed in the first table of the series, which of itself was quite sufficient for all useful purposes. It is there shown that the business in these Courts has gradually and greatly decreased. This is well known to arise from the abolition of arrestment of wages. By that measure a Small Debt decree is now in most cases utterly worthless for all sums below £8, 6s. 8d. Imprisonment is excluded; moveables to attach there are none, or what little may be, is protected by the landlord's hypothec; and lastly, wages under twenty shillings in the week are now protected, so that the trader has no remedy but to refuse all credit to the labouring classes. The ancient reign of the pass-book is over! Now that railway transit covers the land, the longer necessity of Circuits, with only one or two cases to despatch, often by decrees in absence, or to find "Othello's occupation wholly gone," is matter for consideration.

The next division is a table (p. 113) applicable to the Small Debt Courts (for sums under £5) of the Justices of Peace for the years

	1871.	1872.	1873.
Number of causes, . . .	15,271	12,873	12,340
Sums claimed, . . .	£22,719	£19,178	£21,969

The same minute tables follow as were used in the Small Debt Courts of the Sheriff, with the startling report, that of 96 Courts of Justices no less than 53 had either "struck work" or resolved to a "lock-out." Attached to their names there is one uniform blank, whilst in some of the columns attached to many Courts one or two figures are only found to relieve the fatigued eye. In one table (p. 118) no less than four columns set to catch information have not been successful in seizing one fact to grace the void, and they stand out in all their solemn nothingness.

It will be seen that the same result of decreasing business in these cheap Courts is found alike in that of the Justices as of the Sheriff. In the former there is a sort of start or revival in the last year of the series (1873). It may be matter of inquiry whether this may have arisen from the greatly increased rate of wages in some departments of labour, placing a considerable margin still open to the creditor who may have supplied these more fortunate classes with wines and other luxuries beyond the reach of their less lucky co-labourers. One curious table (p. 120) gives the finishing touch to this part of the division, by showing, that of 33,548 decrees given within the year, only 41 were followed by poinding and sale. To recover the *cumulo* sum of £94, the expenses of poinding and sale were £38, and the free proceeds of the sales £100, giving on the whole a surplus of £3 to be paid over to the unfortunate debtors. These ulterior measures were almost wholly confined to Edinburgh, Glasgow, and Dundee. The only other places where decrees were thus enforced were Arbroath and Greenock. All the other of the 36 Courts make no response as to this *dernier resort*.

The remaining tables are the most useful of the whole series, and yet might admit of considerable compression without loss of interest. The Returns in bankruptcy report of sequestrations during the years

	1869.	1870.	1871.	1872.
Number of <i>bankruptcies</i> (?) (meaning no doubt mercantile sequestra- tions), . . . . .	589	555	490	368

There are some important details under this head, and in a subsequent table (p. 123), as to the result of bankruptcy and its costs, which are well worthy the attention of the mercantile community, and some of which might well repay the inquiry of the Chamber of Commerce. In the classification of the *dyvours*, whilst, as might be expected, the great majority belong to the trading community, it is with regret we find within the three years 5 clergymen, 6 medical practitioners, and 27 lawyers seeking the unenviable publicity of the *Gazette*.

As was observed with the statistics of 1872, this branch of bankruptcy is a year behind all the other statistics, there being no return for 1873, as is with all the other departments. We heartily respond to an opinion expressed by the intelligent Accountant

in Bankruptcy, in a footnote to one of the minute tables, "*It would be tedious, and probably not very useful, to specify in detail the causes of the differences (deficiencies) between the estimates of the estates in the inventories and the actual receipts.*" A very useful table (p. 126) gives the statistics of judicial factories.

Another table (p. 127) gives returns of the judicial records kept at Edinburgh of deeds, protests, adjudications, inhibitions, hornings, and certificates of foreign judgments, from which last we learn that fifteen judgments were certified from England, but none from Ireland. A return from the Bill Chamber has strayed from its proper place under the Court of Session, and found rest in this alien corner of the volume.

A table (p. 128) gives the number of sasines presented at the 34 district registers, with the fees received at each, giving in all 23,676 entries and £25,128 of fees.

The final table (p. 129) reports the number of protests on Bills recorded in districts, giving in all 1987 in number, with an aggregate value of £93,808.

Thus once more we have wandered through these not over delectable fields, and gleaned some few facts by the way from the great mass of useless matter. Acknowledging the great value of statistical facts, we are still more and more of opinion that to render them of real value the few salient points should be selected, and that those which can establish no truth, elucidate no fact, or lead to any reform, may be left unearthed. We are not dealing with prisoners, where it is necessary, in order to prove identity and facilitate discovery, to give not only their heights, but the colour of hair and eyes, and especially every mark and blemish which the body, on surgical inspection, may disclose.

H. B.

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## ON THE CONTRACT OF DOMESTIC SERVICE.

THE contract of *locatio conductio operarum* is a consensual contract, whereby one person—the *locator* or lessor—undertakes to let or communicate his labour or services to another—the *conductor* or hirer—during a limited period, for a specified sum, or at a certain rate of wages. The kind of labour or service which the *locator* undertakes to perform for, or render to, the *conductor*, may be manual or mental, skilled or unskilled, being as various as are the branches of industrial occupation. Throughout the entire social fabric, from its lowest to its highest stage, the contract of service is in ceaseless operation. It is the great means, perhaps the principal agency, by which the daily business of life, in its endless ramifications, is transacted. It permeates the economy of households; it pervades every department of trade and commerce; it underlies all the combinations of society for whatsoever purpose formed. To all who come within the categories of "employers of labour," on the one

hand, and "suppliers of labour" on the other, by whatever distinctive appellation known, the rights and obligations involved in the contract of *locatio conductio operarum* apply.

Except in their more general or abstract bearings, however, these rights and obligations vary according to the particular description of the contract in question, or—to state it otherwise, and perhaps more accurately—according to the particular description of service to which the contract relates. Further, even as regards the same kind or class of contracts of service, there are certain distinctions and important differences between the rules of the common law of England and Scotland:—for instance, as regards the implied duration of the contract on the one hand, and the mode of its termination on the other.

Having in view the immediate objects for which certain contracts of service are entered into, the law of Scotland—adopting in this respect as its guide the supposed mutual interests and intentions of the contracting parties—recognises a difference in the periods of their subsistence; and, in the absence of special agreement on the subject, attributes to some such contracts a longer, and to other such contracts a shorter, endurance, and applies a corresponding rule. Thus, by our law, as we shall see, the hiring of a gardener or a gamekeeper is presumed to be for twelve months, while that of a footman or a housemaid is assumed to be for six months only. On the other hand, as we shall also see, the law of England ignores such a distinction, presuming all such contracts of service to be for the uniform period of a year. At the same time, this law conveniently eludes the practical inconveniences which such a lengthened period of duration might involve, by affording facilities for their dissolution, which are really greater than those recognised by our law.

Confining our attention to contracts of domestic service, and referring, in the first instance, to the law of England on the subject, and afterwards to our own, we shall consider, 1st, the nature of this contract (including its duration and implied obligations); 2nd, the mode of terminating it; and 3rd, the remedies competent to the servant on its wrongful termination.

By the law of England the contract of *locatio conductio operarum* is, in the absence of agreement express or implied to the contrary, presumed to import a hiring for the period of a year. Although this rule is frequently stated as if it were a fixed and unqualified doctrine of law, the more recent judicial *dicta* on the subject seem to imply that it partakes rather of the nature of a legal *presumption* arising from recognised custom.

In his treatise on Master and Servant (3rd ed., p. 67) Manley Smith says:—"Where no time is limited either expressly or by implication for the duration of a contract of hiring and service, the hiring is considered as a general hiring, and in point of law a hiring for a year. This rule is applicable to all contracts of hiring and service, whether written or unwritten, whether express or implied,

and whatever be the nature of the service; and is not confined to servants in husbandry, but extends also to domestic and other servants, such as clerks and others."

In *Beeston v. Collyer* (1827, 12 Moore, 552)—which referred to the hiring of a merchant's clerk whose wages were paid quarterly—Gaselee, J., says (p. 556), "The rule is that a general hiring is a hiring for a year;" and Best, C.J., says (p. 554), "I was of opinion at the trial that if a man hires a servant, nothing being said to the contrary, the hiring is for a year."

In *Fawcett v. Cash* (1834, 5 B. and Ad. 904)—which referred to the hiring of a warehouseman with wages payable monthly—Denman, C.J., says (p. 907): "The general rule is, that if a master hire a servant without mentioning the time, that is a general hiring, and in point of law a hiring for a year."

While these *dicta* might be read as importing that the rule referred to amounted to an abstract legal doctrine, the remarks of Tindal, C.J., in the later case of *Baxter v. Nurse* (1844, 6 M. and G. 935)—which referred to the hiring of the editor of a *new* periodical—imply that it is substantially nothing more than a legal presumption. Referring to the contention of counsel that the hiring in this instance must be taken to have been by the year, his Lordship remarks (p. 938): "It appears to me that the principle on which contracts of this nature, which have been entered into without any definite arrangement as to time, are held to be contracts for a year, is by no means an inflexible rule, but that it is a presumption to be raised from contracts of the same kind; and that the judge at a trial is not authorized to lay down any general rule on the subject. . . . In cases where a general rule with regard to questions of hiring has been established, it has been in conformity with some established usage to be gathered from evidence." Coltman, J., says (p. 939): "The rule with regard to domestic servants is established; but that rule applies only in the absence of any fact which would tend to show that an annual hiring was not contemplated. Thus, if there be a reservation of weekly wages, the inference of a hiring for a year does not arise." In *Fairman v. Oakford* (1860, 5 Hur. and Nor. 635)—which related to the hiring of a merchant's clerk—Pollock, C.B., observed: . . . "There is no inflexible rule that a general hiring is a hiring for a year. Each particular case must depend upon its own circumstances. From much experience of juries, I have come to the conclusion, that usually the indefinite hiring of a clerk is not a hiring for a year, but rather one determinable by three months' notice." In *Turner v. Robinson* (1833, 2 N. and M. 829) Parke, J., says: "The only question is whether there is any evidence to rebut the *presumption* of the contract being for a year."

While, however, the law of England presumes, and in the absence of evidence to the contrary applies, the presumption that a general contract of hiring between a master and a domestic servant is a contract for a year, it recognises, as inherent in, or engrafted on the



contract by force of usage or custom, this condition or qualification, viz., that either party may terminate the engagement on giving the other a month's notice, or that the master may do so by paying or tendering to the servant a month's wages,—which do not include board wages.

Thus:—In *Fawcett v. Cash* (1834, 5 B. and Ad. 904), Littledale, J., says (p. 908): “In the case of domestic servants the rule is well established, that the contract may be terminated by a month's notice or a month's wages, but that depends upon custom;” and Patteson, J., remarks (p. 909): “This is not the case of a domestic servant, where the contract might have been put an end to by paying a month's wages or giving a month's warning.” In *Williams v. Byrne* (1837, 2 N. and P. 139)—which referred to the hiring of a newspaper reporter—Littledale, J., says (p. 142): “The case of a menial servant has been put, who may be discharged at a month's notice, but that is not a matter of law; it is a custom that might be put on the record as a fact.” In *Brozham v. Wagstaffe* (1841, 5 Eng. Jur. 845)—which related to the hiring of a chemist's assistant—Parke, B., says: “As to its being a hiring by the year, determinable on a month's warning, it is well known that that custom only holds in the case of menial servants.” In *Turner v. Mason* (1845, 14 M. and W. 112)—assumpsit for the alleged wrongful dismissal of a domestic servant without a month's notice or a month's wages—Parke, B., observes (p. 116): “The contract between the master and a domestic servant is a contract to serve for a year, the service to be terminated by a month's warning or by payment of a month's wages.” In *Metzner v. Bolton* (1854, 9 Exc. 518)—which related to the engagement of a commercial traveller—Alderson, B., says (p. 519): “When a person hires a domestic servant, though nothing is said about notice, it is plain that, according to the custom of England, it is a hiring for a year, with liberty to put an end to the contract by giving a month's notice.”

In *Nowlan v. Ablett* (1835, 2 C. M. and R. 54), a head gardener, who, after being four years in his master's employment, was dismissed on a month's notice, raised an action to recover a quarter's wages, on the footing of his being a yearly servant, and on the contention that it lay on the defendant to show that there was any custom entitling him to dismiss the plaintiff on such notice. This contention, however, was repelled,—the Court holding that, as the plaintiff fell within the category of a domestic servant, the right to terminate the contract of employment in the way adopted presumably belonged to the defendant, and did not require to be proved or set up by him. Lord Abinger, C.B., says (p. 59): “Did you ever know that done? If a footman were discharged on a month's notice, and he afterwards brought an action for wages, would it be necessary to prove that there was any custom as to domestic servants, and that he came within that custom?”

The reason for the English rule, that a yearly hiring of a domestic or menial servant is terminable by either party by giving a month's warning, or by the master on payment of a month's wages, is thus stated by Erle, C.J., in *Nicoll v. Greaves* (1864, 33 L. J., C. P., p. 261): "It seems to me that the reason of the general rule in these cases is, that there are some contracts of service which bring the parties into close proximity with one another, and which, though such association may be valuable, renders it the interest of both that the contract should be capable of being determined before the end of the year. When the duties of the servant are such that he is required to be frequently near his master, if any ill feeling should arise between them, the presence of that servant would be a constant source of irritation to the master; and, on the other hand, it may happen that a well-intentioned servant may have a dissatisfied master, constantly finding fault with him, and the sooner he is free from such service the greater will be his happiness. The law is mutual, and it is to the advantage of both parties that such a contract, when it turns out that the connexion is incompatible with comfort on either side, should be determinable by a month's notice."

When the person hired is not a domestic or menial servant, the implied rule of a month's warning or a month's wages does not hold. Hence, where a clerk to an army agent was without reason dismissed, his employer was found liable in payment to him of his wages down to the termination of the year. (*Beeston v. Collyer*, 1827, 12 Moore 552; and *per Parke, B.*, in *Broxham v. Wagstaffe*, 1841, 5 Eng. Jur. 845.)

As already observed, the month's wages, on payment of which the master may terminate the contract, are limited to the stipulated money wages for a calendar month, and do not include board wages. Although different from our own law in this respect, and not very easily reconcilable with principle, such appears to be the rule of the law of England. Thus, in *Gordon v. Potter* (1859, 1 Fos. and Fin. 644), it was decided that a domestic servant—a cook and housekeeper—who was discharged without reason by her master, is entitled to the wages accruing to the time of her discharge, and to a calendar month's wages in addition, *but not to board wages for the month*. Mr. Justice Hill directed the jury that, "if they thought there was not sufficient evidence of the drunkenness, they must give as damages the accruing wages up to the time when she was discharged, and a calendar month's wages in addition—*without board wages*—as a master had a right to discharge a servant simply by payment of a month's wages in addition to the accruing wages up to the time of the discharge." As Manley Smith (p. 74 note *m*), when referring to this case, cites it without comment, it may be assumed that the law laid down in it is unquestionable.

Having now alluded to this alternative mode of dissolving a

contract of domestic service—for to such class of contracts, as already remarked, the rule is limited—it will be proper next to indicate what the legal meaning of the term “domestic” as here used is, *i.e.* what classes of servants it includes.

Substantially the expression “domestic,” as here used, is equivalent to “menial,” and refers to and embraces those servants who are engaged to perform work within the house, or render services to the household or to members of the family in connexion with the home establishment. Blackstone derives the term “menial” from *intra mœnia*. He says (1 Kerr’s Blackstone, 3d ed. p. 431): “The first sort of servants acknowledged by the laws of England are *menial servants*; so called from being *intra mœnia*, or domestics.” Manley Smith (p. 75, footnote) diffidently suggests that the term may be derived from the Greek *μην*, a month, in allusion to the period of notice on which the engagements of menial servants may be terminated.

This latter theory, although an ingenious one, is not very satisfactory. Dissolution of the yearly contract of service on a month’s notice is universally attributed to usage or custom. But the word “menial” being as old as the English language, it may fairly be assumed to have existed before any such usage or custom had arisen. If so, it is scarcely logical to claim as the origin of the term a rule of practice which had not been adopted until after the term itself was in use.

The derivation adopted by Blackstone and many other writers—which attributes the origin of the term “menial” to the locality where these services are rendered—appears more accurate and satisfactory. At the same time, some ambiguity, or at least a tendency unduly to limit the legal scope of the expression “menial,” is apt to be associated with the Latin derivation here adopted. Thus, Mr. Fraser, in his well-known treatise on Master and Servant (2d ed., p. 30, note *b*), seems to limit menial servants to those who *live* within the master’s house. This seems, however, too confined a view of the expression; and some of the cases cited by that learned author in the text (pp. 30, 31)—several of which are English—distinctly express, or plainly imply, that residence on the servant’s part within the walls of his master’s house is not essential to constitute him a menial servant.

This Lord Abinger, C.B., clearly recognises in *Nowlan v. Ablett* (1835, 2 C. M. and R. 54), when he says (p. 59), “I should have been inclined to have told the jury, that the plaintiff was a menial servant; for though he did not live in the defendant’s house or within the curtilage (*intra mœnia*), he lived on the grounds within the domain.” The word curtilage means a court, yard, field, or enclosure near and belonging to the messuage. In this case the plaintiff, a head gardener, lived in a house on the defendant’s property, about 200 yards from his residence.

It may perhaps even be doubted whether the servant’s residence

on the master's property is absolutely essential to the character of a menial servant, provided he or she has, under a yearly hiring, been engaged to perform, and actually does perform, really domestic services—whether indoor household work proper, or outdoor work—provided it truly be *domestic* work, *i.e.* work connected with the *menage* of the family establishment. No doubt there is more of the element of domesticity associated with an indoor, than with an outdoor servant; yet a coachman or a gardener may, just as much as a cook or a tablemaid, be a menial servant; and it seems somewhat inconsistent with principle to make the accident of the locality of residence of the outdoor servant the test of whether he is or is not a menial servant, and so entitled to leave, or liable to be dismissed on a month's warning or a month's wages. Take the case of a gentleman residing in the immediate vicinity of London, with a large garden and a portion of ground attached to his house, on which, however, there is no cottage or residence for an outdoor servant. It seems unreasonable to hold that the head gardener, engaged under a yearly contract, is not to be treated and dealt with as a domestic or menial servant, merely because he, *ex necessitate*, lives outwith the confines of the grounds. The character of his services, and the connexion which, through these services, subsists between him and the establishment, seem a better test of the degree of domesticity which attaches to him, than the accident of the place of his abode. It may, perhaps, almost be said that in a certain class of cases, at least, this latter circumstance has been somewhat disregarded as a test.

In *Booth v. Dean* (1833, 1 Mylne & K. 560), where a bequest of a year's wages "to each of my servants" was held confined to servants hired by the year, Sir John Leach, M.R., says—"In speaking of a year's wages, the testator plainly used that expression with reference to *family servants usually hired by the year*." In *Ogle v. Morgan* (1852, 1 De G. M. & G. 359)—under a bequest "to each person as a servant in my domestic establishment at the time of my decease, a year's wages beyond what shall be due to him or her for wages"—it was held that a head-gardener who lived in one of the testator's cottages, but was not dieted by him, was *not* entitled to a year's wages. In the succeeding case of *Blackwell v. Pennant* (1852, 9 Hare, 551)—a bequest "to each of the servants living with me at the time of my decease, and who shall then have lived in my service for three years"—was held to include servants of the testator not living within his house (although on his property); but to exclude servants not hired by the year. Here Turner, V.C., says (p. 553): "The words *living with me*, as applied to servants, may, I think, well be understood to mean living in my service, and this I am much disposed to think is the ordinary import of the words. . . . It cannot, I think, reasonably be held that he was not living with the testator in the sense in which servants live with their masters, because he was not actually living in the same house as his master. The

cases cited from *Vernon* and from *Haggard* support this view, as does also *Ogle v. Morgan* (1 De G. M. & G. 359), in which the late Lord Chancellor evidently considered that the plaintiff was a servant in the establishment, though not in the domestic establishment, and *Booth v. Dean* (1 My. and K. 560) does not appear to me to be opposed to it: for all that Sir J. Leach there says is, that (9 Hare, p. 553) "the bequest would apply only to family servants; and not that only servants living in the house were to be deemed family servants."

In these and all similar cases the question no doubt relates to the testator's intention or meaning under the words of bequest employed; yet the above decisions and judicial *dicta* indicate not only that residence on the servant's part, *intra mœnia* of the master's house, is not essential to the character or *status* of a domestic or menial servant; they further tend toward the theory that in England, a servant hired by the year falls within this category, when the nature of the services to be rendered by him or her are immediately and directly connected with the performance of the household work—whether indoor or outdoor—which, in its combined departments, constitutes the economy of the establishment as the home or residence of the family.

In this view of the matter, a "domestic" servant is one (being hired by the year) who is of the number of the family attendants or retinue:—the corresponding term "menial" being derived from the old Saxon term "meynee" or "meyne." Thus, in Wiclif's translation (in 1380) of the New Testament, we find these expressions:—St. Matthew, chap. x. ver. 25, "If thei hav clepid the housebonde man Belzebug: how myche more hise *household meynee*?" Again, St. Luke, chap. ii. ver. 4, . . . "For that he was of the hous and of the *meyne* of Dauith." See also Richardson's Dictionary, vol. ii, p. 1255, *voce* "many," "menial."

Within the category of domestic or menial servants the law of England classes a gardener (*Johnson v. Blenkinsopp*, 1841, 5 Jur. 870), a head gardener (*Nowlan v. Ablett*, 1835, 4 L. J., N. S., Exc 155), and a huntsman (*Nicoll v. Greaves*, 1864, 17 C. B., N. S. 27). On the other hand, a governess is not included within the category (*Todd v. Kerrich*, 1852, 8 Exch. Rep. 151). Here the governess seems to have been a resident governess.

By the law of England the contract of domestic service, which is assumed to be for a year, may competently be proved by parole evidence (Manley Smith, p. 28). Writing is only required when the subsistence of the contract exceeds a year. It will not, however, be presumed or taken to be a contract for more than a year, and so require writing to establish it, from the circumstance that the servant has been in the service for a longer period. Although he or she has been so for several or even many years, the engagement is still regarded as an annual one—its continued duration beyond one or more years being ascribed to a renewed contract, or, as we should say, to tacit relocation. In *Beeston v. Collyer* (*supra*), where con-

tinued service in a merchant's employment for several years was pleaded by a clerk as implying an engagement for more than a year; this plea was repelled on the principle above stated, Best, L.C.J., observing (12 Moore, p. 554): "There is no need of such a contract being in writing. If a contract be express not to be performed within a year, it must undoubtedly be in writing, but," etc.

To understand the grounds on which the contract of domestic service may warrantably be dissolved, and the remedies competent to the aggrieved party on its evasion or illegal termination, it is necessary to have in view the implied mutual obligations and duties of the contracting parties.

So far as the servant is concerned these may be thus summarized: He is bound (1) efficiently to perform the work which falls within the compass of his or her department, as that of coachman, butler, cook, or table-maid, etc.; (2) to obey implicitly all lawful orders given by the master or mistress falling within the scope of the servant's department; and (3) to be respectful in deportment toward all the members of the family, and strictly honest, sober, and chaste in conduct and conversation.

While, on the other hand, it is the duty of the master to provide for the comfort of, and to conduct himself with temper and moderation toward, his domestic servants, his pre-eminent legal obligation relates to the payment of the stipulated amount of wages in return for the services rendered. But does the discharge of these duties and this obligation exhaust the extent of the master's implied undertaking; or is he, in addition thereto, bound to supply work for the servant within his department during the period of the engagement? Thus, is the coachman or head gardener entitled to require that his master shall continue to keep, during the currency of the year, his carriage and pair, or his flower and kitchen garden, as he did at the commencement of the term of service, in order that the former may retain or increase his skill as a "whip," and the latter as a horticulturist? If the master be bound to do this, it would seem logically to follow that his refusal to do so would subject him in damages to his servant.

The principle involved in the above query applies to the cook or the laundry-maid; and indeed, in a greater or less degree, to every female domestic servant, whose continued efficiency in her department is dependent on the condition that she is supplied by her mistress with the relative kind of work. If the mistress discontinue giving dinner-parties, or decide to "send out" the linen, instead of having it "got up" at home, the cook, on the one hand, or the laundry-maid on the other, is thereby deprived of the means of (as the phrase goes) "keeping her hand in," and so may, and almost certainly will, become less efficient in her particular department. Could either of these servants insist that her mistress should maintain her establishment, or at least that branch of it to which she was attached, on the same extensive scale as at the commencement

of the contract, or failing the mistress doing this, successfully sue her for damages?

According to the law of England, as would appear, these questions fall to be answered in the negative.

There are two cases recognised by that law in which the master may be legally bound to supply the servant with work, viz. : (1) when the stipulated amount of earnings or wages is, by the conception of the contract, directly or impliedly made dependent on the amount of work done; and (2) when the person engaged combines in his person the character of a *pupil* as well as a *servant*, *ex. gr.*, an apprentice. In the latter case the master undertakes to *instruct* the apprentice in a particular branch of industry, and in order to do so, must supply him with work as a means of imparting such instruction. A domestic servant, however, under an ordinary contract of hiring, does not come within the category of an apprentice.

On the other hand, a domestic servant never is, and practically never could be, paid by piece-work. His or her wages consist of a fixed sum, calculated by time. The work to be performed, though in a general way sufficiently defined, is scarcely susceptible of enumeration in its details. These details are often of an innominate character—appreciable, but not definable. In truth, some portion of the wages earned by a domestic servant is, in many cases, not for any particular work done, but for an agreeable manner or an imposing appearance. Flora is paid for her gentle movements, and “Jeames” for his handsome calves, as well as for waiting at table, or attending “her ladyship” in the Park.

Now, it is difficult to see how such a contract of hiring can fall within the principle of the former class of cases just referred to. In them the wages or remuneration earned by the servant is directly dependent on the amount of actual work done by him—which work it lies with the master to supply. Presuming that the servant desires to earn wages, and that he entered into the contract for the very purpose of doing so, law makes it incumbent on the master to supply the servant with work. Yet, even here the contract must be so expressed as to import such an obligation on the master. And this must appear under the contract, otherwise the master is not so bound. On this principle, the case of *Williamson v. Taylor and others* (1843, 5 Q. B. 175) rests. Here, the defendants, owners of a colliery, hired the plaintiff to hew and work at the colliery for wages at certain rates according to the work done, and he agreed to continue defendants’ servant during all the time the pit should be laid off work, and to do a full day’s work on every working day during the term of the engagement, from 5th April 1843 to 5th April 1844. In an action at the plaintiff’s instance, it was held that the defendants were not obliged under this contract to employ the plaintiff at reasonable times for a reasonable number of working days during the said term.

As examples of the class of cases in which this Court has recognised an obligation on the master to supply work for the servant, to enable him to earn wages, may be mentioned *Pilkington v. Scott* (1846, 15 M. and W. 657), *Hartley v. Cummings* (1847, 5 Q. B. 247), and *Whittle v. Frankland*, 1862, 31 L. J., M. C. 81). None of these decisions, however, relate to contracts of domestic service. They are all pure trade-service contracts.

In the leading case of *Emmens v. Elderton* (1853, 4 H. of L. Cases, 624), where the question was, whether—under an agreement between an assurance company and the plaintiff, that he “as the attorney and solicitor of the company should receive £100 *per annum*, in lieu of rendering a bill of costs for general business transacted by him for the company—the company was entitled to dismiss him from their service within a period of six months from the date of the engagement (which it was ultimately decided that they were), Compton, J., observes (p. 643):—“It was said that in the case of domestic servants, there are collateral advantages for the loss of which an action of damages would lie; and that in such case there is really a contract to *keep in employment*, in addition to what is said to be the only contract in cases like the present (client and attorney), to pay at the end of the year. I think, however, that this distinction is not tenable, and that wherever there is a contract for hiring or employment on the one part, and services for wages or salary on the other, for a specified time, there is an engagement on the part of the employer to keep the employed in the relation in question during that time, and not merely to pay him the wages for the services at the end; and that in none of these cases does the obligation to keep retained and employed necessarily import an obligation on the part of the master to supply work.”

The import of these *dicta* seems to be: (1) that a master is not bound to furnish or provide work for the employment or the benefit of his domestic servants; but (2) that *while the contract of service subsists* the master must deal with, or treat the servant as occupying the relationship or holding the character for which he was hired. He may not ignore the servant's special province or office in the establishment, or devolve on him the performance of duties which do not lie within it. This latter obligation, however, practically amounts to very little; as the master can terminate the engagement (by the servant's dismissal) either on a month's notice, or at once, on payment of a month's wages.

Besides the natural ending of the engagement by the efflux of time, a common mode in which the contract of domestic service is brought to a conclusion is by the dismissal of the servant before its termination. Such dismissal may be either rightful or wrongful.

The rightful dismissal of a servant may result either from a breach of the contract on his part, or from the termination of it on the part of the master by a month's warning, or payment of a month's wages. In the former case, the servant's misconduct justifies the



master in cancelling the contract. In the latter case, law empowers the master to terminate it in the alternative manner mentioned. Being entitled thus to act, the servant's dismissal in this way is just as *lawful*, and, therefore, *rightful*, as it is on the former ground.

When a servant violates any of the obligations expressly or impliedly undertaken by him, he has by such conduct broken his part of the bargain. Having done so, the master is no longer bound to implement his part of it; but, on the contrary, is free to renege therefrom, and to terminate the contract by the immediate dismissal of the servant.

A domestic servant is held to violate the obligations imposed on him by the contract of service, (1) if he fails to discharge the duties for the performance of which he was engaged. Such failure may arise from inherent incapacity, or supervening inability, induced by permanent illness or accident, or may result from habitual negligence or confirmed laziness, or from improperly absenting himself from his master's house. From whatever of these causes arising, such failure on the part of the servant to perform his share of the contract constitutes a breach thereof, and entitles the master to dissolve it by dismissing his servant.

The following English cases support this proposition and illustrate the application of the principle, under the alternative grounds of failure suggested. In *Harmer v. Cornelius* (1858, 28 L. J., C. P. 85), Willes, J., says (p. 88): "The failure to afford the requisite skill which has been expressly or impliedly promised is a breach of legal duty, and therefore misconduct. The rule of the civil law, *imperitia culpa admuneratur*, applies." In *Cuckson v. Stones* (1858, 28 L. J., Q. B. 25), Lord Campbell, C.J., says (p. 28): "He (the servant to a brewer) could not be considered incompetent by illness of a temporary nature. But if he had been struck with disease so that he could never be expected to return to his work, we think the defendants might have dismissed him." In *Callo v. Brouncker* (1831, 4 C. and P. 518), Parke, J., told the jury "that if there was any moral misconduct, either pecuniary or otherwise, wilful disobedience, or *habitual neglect*," the master would be entitled to part with the servant. And Manley Smith (p. 116, top) quotes this *dictum* by Lord Wensleydale, viz. "That for habitual neglect the defendant was at liberty to part with the plaintiff."

A domestic servant is also held to violate the obligations incumbent on him or her by grossly immoral conduct, whether falling under the category of dishonesty, intemperance, or lewdness. In *Cunningham v. Fonblanque* (1833, 6 C. & P. 44), Parke, J., says (p. 49): "If a servant rob his master he may, though a month's notice is required, dismiss him without any notice, and need not pay him a month's wages; and if he is negligent in his business and injures his master, I am not prepared to say that the master may not dismiss him." See also the unreported case of *Brown v. Croft* mentioned in 6 C. & P. p. 16, note (g).

In *Speck v. Phillips* (1839, 5 M. & W. 279) Lord Abinger, C.B., recognises drunkenness as a justifiable ground of dismissal. To a like effect is the bearing of *Wise v. Wilson* (1845, 1 C. & K. 662).

Immorality, implying lewdness of conduct on the servant's part, furnishes a good ground of discharge. To this effect in the Irish case of *Connors v. Justice* (1862, 13 I. C. L. Rep. 451), Monahan, J.C., treats chastity as an essential requisite in a female domestic servant, and pointedly asks (p. 457), "And can any one doubt that the master or mistress of a family would be justified in dismissing without the usual month's notice a female domestic servant for unchaste conduct?" In the old case of *Rex v. Inhabitants of Welford* (1778, Caldecott's Rep. 57), it appears to have been ruled that a male servant who was the father of an illegitimate child (apparently by a servant girl when in service with his master) was liable for this act of immorality to be dismissed.

Wilful disobedience of any lawful order given by the master to the servant within the scope of his or her duty or department, is a breach of the contract on the servant's part, and may be justly followed by immediate dismissal. In *Turner v. Mason* (1845, 14 M. & W. 112) Parke, B., states the doctrine thus (p. 115): "The obligation of a domestic servant is to obey all lawful commands. . . . The master is to be the judge of the circumstances under which the servant's services are required, subject to this that he is to give only lawful commands" (p. 116); "The wilful disobedience of any lawful order of the master is a good cause of discharge." Alderson, B., says (p. 118), "Wilful disobedience is a sufficient ground of dismissal." To a like effect are the *dicta* of Lord Ellenborough in *Spain v. Arnott* (1817, 2 St. 256), and of Parke, B., in *Callo v. Brouncker* (*supra*), confirmed by the Court of Queen's Bench in *Amor v. Fearon* (1839, 9 Ad. & E. 548), which recognise the rule that the wilful disobedience on the part of the servant of any lawful order by the master is a good cause of discharge.

If, in respect of the servant's misconduct, a good ground of dismissal *de facto* exist, this will effectually justify the master in discharging him, although the former neither assigned such misconduct as the reason for dismissing the servant, nor was actuated by it. This doctrine is explicitly laid down by Lord Denman, C.J., in *Ridgway v. Hungerford Market Coy.* (1835, 4 N. & M. 797), where it was ruled that the absence of proof connecting the dismissal with the misconduct of the servant did *not* entitle him to maintain an action for his wages—a good ground of dismissal *de facto* existing. Here Patteson, J., observes (p. 805), "All that is necessary is, that the master should *have* sufficient cause previously to the dismissal."

When, in consequence of misconduct, a domestic servant has been discharged (in this case rightfully), he not only forfeits all wages for the period of service which at the date of dismissal remains unexpired, but likewise all right to wages for the period

preceding the dismissal. The reason of this is, that in all contracts of service for a certain period—under which category the hiring of a domestic or menial servant falls—the faithful performance of service throughout the whole period of the engagement is a condition precedent of the right to wages.

This doctrine is affirmed in *Spain v. Arnott* (1817, 2 St. 256), *Turner v. Robinson* (1833, 6 C. & P. 15), and *Lilley v. Elwin* (1848, 11 Q. B. 742), in which last case Coleridge, J., says (p. 755): "If the plaintiff had been guilty of disobedience of orders and unlawfully absenting himself from his work, so as to justify that discharge (assuming the defendant to have discharged the plaintiff), then, no wages being due, the plaintiff was entitled to nothing, and the *indebitatus* count cannot be sustained." In *Ridgway v. Hungerford Market Coy.* (*supra*), Coleridge, J., thus states the rule (4 N. & M. p. 806): "It is settled that, if sufficient cause be given for turning away a yearly servant in the middle of the current year, and he is dismissed, he cannot recover his wages *pro rata*."

In *Archard v. Horner* (1828, 3 Car. & P. 349), Lord Tenterden seems to have entertained a different opinion,—regarding the servant as entitled to recover wages proportioned to the time he had served. This view, however, is inconsistent with the above and other decisions on the point, and may now be considered as overruled by them.

When the master (as he is entitled to do) prematurely terminates, during its currency, the yearly engagement, on a month's notice or by payment of a month's wages, and dismisses the servant (in this case also rightfully, because in a lawful manner),—no misconduct on the servant's part inducing his discharge is implied. Consequently, on the footing or presumption that he has hitherto faithfully performed the services incumbent on him, the servant is entitled to wages for the period he has served, in addition to the wages for the last month (whether these have been earned by service during that period or paid on immediate dismissal).

When a domestic servant is *wrongfully* dismissed during the currency of the year's engagement, two different views may be taken of the legal nature or quality of such dismissal. Being unwarrantable, it may be regarded either as an *abortive* proceeding on the part of the master, or as an *operative* act done by him to the loss and damage of the servant. Viewed as an *abortive* proceeding, the contract of service remains unrescinded and subsisting. Viewed as an *operative* act, its effect is to entitle the servant to treat the contract as rescinded and at an end.

Adopting the former alternative, and assuming the contract as still subsisting, the servant may either bring an action against the master for *breach* of *his* obligation under the contract, *i.e.* an action for compensation of the wrong, or he may bring an action to enforce implement of the master's obligation under the contract, *i.e.* to pay the wages agreed on.

Had the engagement come to its natural termination, the servant would have been entitled to the stipulated amount of wages for services rendered. In the case supposed, law assumes the servant's willingness to render these services; and regarding them (at the termination of the term) as constructively—although, from the master's unwarrantable act not actually—performed, the law of England has recognised the servant's right, at the *termination of the term*, to sue the master for the stipulated amount of wages due for the whole period.

This was the form of remedy adopted in *Gandell v. Pontigny* (1816, 4 Camp. 375). Here a clerk, who had been wrongfully dismissed during the currency of a quarter (when he was paid £25 as the proportion of wages then earned), sued his master at the end of the quarter for £25, being the balance of the wages due for the remainder of the quarter. Against this demand it was pleaded that a servant could not recover wages for a period during which he had not served. This plea, however, was repelled—Lord Ellenborough observing that, "having served a part of the quarter, and being willing to serve the residue, in contemplation of law he may be considered to have served the whole. The defendant was therefore indebted to him for work and labour in the sum sought to be recovered." See also *Collins v. Price* (1828, 5 Bing. 132).

To entitle the servant, however, to recover the amount of wages due for the period of service he must defer his action until that period has elapsed. He cannot insist on this remedy immediately on his dismissal,—pleading his willingness to work during the remainder of the term. Still less can he do so, as at that date, if the master have expressly refused a tender of his services. See *Smith v. Haywood* (1837, 7 A. & E. 544), in which it is right, however, to observe that Coleridge, J., expresses a doubt of the soundness of the decision in *Gandell v. Pontigny* just referred to; and Smith, in his *Leading Cases* (vol. ii. p. 43), referring particularly to the observations of Patteson and Erle, JJ., in *Goodman v. Pocock* (1850, 15 Q. B. 576), characterizes it as one which appears "to have shaken still further the ruling in *Gandell v. Pontigny*." Manley Smith (p. 152, note p.) goes the length of saying that the course here suggested cannot be adopted; and that the cases which seem to support it must be held to be overruled. He rests the alleged incompetency of the remedy in question upon the application of the doctrine laid down by Erle, J., in *Beckham v. Drake* (1849, 2 H. of L. Cases, p. 606), "that when a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment." But, even assuming this "duty" to amount to a legal obligation—which is open to doubt—the servant may, after having used all possible diligence, fail in doing this. In such a case (assuming the servant can prove it) it seems plain that the doctrine above stated does not preclude the servant from adopting the course referred to.

On the other hand; and still regarding the contract as subsisting,

the servant may bring a special action against the master for his breach of it, in the shape of a claim for compensation for the loss or damage he (the servant) has sustained through his improper dismissal. As ruled in *Pagani v. Gandolfi* (1826, 2 Car. & P. 370), the servant may insist in such an action immediately on his discharge, without waiting the lapse of the term of engagement.

The remedy which the servant seeks under this action is *compensation* for loss or damage sustained by him from his dismissal, *i.e.* for the *breach* of the contract by the master—not for *implement* of his promise or undertaking to pay the wages earned by the servant during the period prior to his dismissal. Hence, under an action concluding for compensation alone, the servant will not be allowed to recover the amount of wages earned for the period of the term prior to his dismissal. For this sum he must specially conclude, as for a debt due under the contract. See *Hartley v. Harman* (1840, 11 Ad. & El. 798).

The *compensation* for which the servant may sue is for loss or damage incurred by him through the wrongful dismissal. In the leading case of *Beckham v. Drake* (1849, 2 H. of L. Cases, 579), it was ruled that the right to sue for such compensation passed on the servant's bankruptcy to his official assignee. The ground on which this judgment is rested implies that the loss or damage incurred excludes all allowance as for *personal* feelings, and must be estimated on the same principle as for the loss of a bargain in respect of common merchandise, wholly regardless of the considerations which guide, when bodily or mental pain is to be regarded. Erle, J., states the law on the subject thus (p. 606): "The measure of damages for the breach of promise now in question (*viz.*, on the master's part to pay wages) is obtained by considering what is the usual rate of wages for the employment here contracted for, and what time would be lost before a similar employment could be obtained. The law considers that employment in any branch of industry can be obtained by a person competent for the place, and that the usual rate of wages for such employment can be proved, and that when a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment."

As a domestic servant may, by the law of England, be dismissed on a month's notice or a month's wages, the extent of the compensation recoverable by the servant (wrongously dismissed, without such notice or wages) appears to be a month's wages. For, as remarked by Lord Denman, C.J., in *Hartley v. Harman* (1840, 11 Ad. and El. p. 801), "on such a dismissal a month's wages must be looked upon as stipulated *damages*,"—in contrast to the prior wages earned, which he considers cannot be so regarded. These are a debt due, either under the contract or on the principle of *quantum meruit*. Hill, J., appears to express a different and an erroneous doctrine on this subject when, in *Gordon v. Potter* (1859, 1 Fos. and

Fin., p. 645), he told the jury that if they thought there was not misbehaviour on the servant's part, "they must give *as damages* the *accruing wages* up to the time she was discharged, and a calendar month's wages in addition."

While the extent of the servant's claim for compensation cannot apparently exceed the amount of a month's wages, circumstances may diminish the amount of damages. Thus, if immediately on her dismissal the servant engaged herself to another master at equal or higher wages; or even if such an offer of service was made to her,—these are circumstances which would considerably affect the compensation due, or might even render the damages *nil* or merely nominal. In *Speck v. Phillips* (1839, 5 M. and W. 279), Alderson, B., says (p. 282), "An offer to employ him (the servant) afterwards by a third party might well be given in evidence in mitigation of damages." To a similar effect in *Hochster v. De la Tour* (1853, 2 E. and B., 678)—where, some weeks before the date of the commencement of the contract of service, a gentleman broke off an engagement with a courier, who meanwhile obtained an equally good engagement with another party—Lord Campbell, C.J., says, (p. 690), the servant "is at liberty to seek service under another employer, which would go in mitigation of the damages to which he would otherwise be entitled for a breach of the contract." The principle on which the measure of damages due to a servant wrongfully dismissed is estimated, is explained in *Elderton v. Emmens*, 4 Com. B. 479; 6 Com. B. 160, and 4 H. of L. Cases, 624, already referred to.

Lastly—as by the wrongful dismissal of the servant the master has violated his obligation under and broken the contract, the former is entitled to treat it as rescinded, and to act as if no such contract had ever been entered into. Adopting this view of his employer's illegal conduct, the servant may, *quoad* the future, at once enter into any new engagement which presents itself; and, *quoad* the past, sue the master for remuneration on the footing of *quantum meruit*. As Lord Campbell, in *Goodman v. Pocock* (1850, 15 Q. B., p. 580), says, "He may then (on dismissal) have rescinded the contract and have recovered *pro rata* on a *quantum meruit*." The servant may insist in such an action immediately on his dismissal; but of course its conclusions must be limited to the period during which he has actually served, and to remuneration for work actually performed by him. See *per* Patteson and Erle, JJ., in *Goodman, supra*. The servant cannot enlarge the extent, because he cannot alter the nature of his claim, by postponing his action until the expiry of the period of the engagement under the contract.

Consistently with the course adopted in *Goodman v. Pocock*, it would appear that if the servant, having elected to treat the contract as *subsisting*, has brought an action of damages against the master for wrongful dismissal, he cannot afterwards treat the contract as *rescinded*, and sue for remuneration on the footing of *quantum meruit*.

Having now, as proposed at the outset of this article, referred to the three points there mentioned connected with the contract of domestic service under the law of England, we purpose in a succeeding number of the Journal to treat of them in connection with the the law of Scotland.

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### IMPLIED CONTRACTS FOR SERVICES.

#### (AMERICAN LAW.)

As a general rule there can be no doubt, that where one renders services for another, to his knowledge and without objection, although without express employment or agreement for compensation, the law will *prima facie* imply a contract to pay for those services their reasonable value. The application of the rule is most frequently called for in administering upon the estates of deceased persons, and in those cases a very important qualification has been established, namely, that as between relatives or members of the same family the presumption does not arise or attaches with diminished force. In ordinary cases the presumption arises because the law can perceive no other consideration for the rendition of the services than an expected pecuniary reward. As between relatives and members of the same family, however, the law can see another consideration in natural affection or intimate friendship. Judge Pratt draws the proper distinction very accurately in *Williams v. Hutchison*, 3 N. Y. 312: "A contract or promise to pay as a matter of fact, requires affirmative proof to establish it. Under certain circumstances, when one man labours for another, a presumption of fact arises that the person for whom he labours will pay him the value of his services. It is a conclusion to which the mind readily comes from a knowledge of the circumstances of the particular case, and the ordinary dealings between man and man. But where the services are between members of the same family no such presumption will arise. We find other motives than the desire of gain which may prompt the exchange of mutual benefits between them; and hence no right of action will accrue to either party, although the services or benefits received may have been very valuable, and this does not so much depend upon an implied contract that the services are to be gratuitous, as upon the absence of any contract or promise that a reward should be paid." The action in which this language was held was brought by a stepson against his stepfather to recover the value of services rendered by him while a member of the defendant's family, and while he was receiving board, clothing and schooling at the hands of the latter. In the absence of any express agreement for compensation, the Court of Appeals held that no recovery could be had.

In *Robinson v. Cushman, adm'r, etc.*, 2 Denio, 149, the plaintiff was the widowed sister of the deceased, who had invited her to come and make his house her home. She accordingly went, with her daughter, and both remained with him about fourteen years, rendered services to him, were clothed by him, and the daughter was educated by him. There was no express contract proved, but the plaintiff relied upon a sealed note made by the deceased, never delivered, but found among his papers, for \$2,000 payable to the plaintiff or order, and expressing as its consideration services rendered to the maker. A judgment for \$2,000 in favour of the plaintiff was set aside by the Supreme Court.

In *Davies v. Davies*, 9 C. & P. 87, the plaintiff and his wife boarded and lodged in the house of the defendant, and assisted him in his business; it was held that neither the service on the one hand, nor the board and lodging on the other, were to be paid for, unless the jury were satisfied that the parties came together on the terms that they were to pay and to be paid.

In *Weirs v. Weirs' Admrs.*, 3 B. Munroe's Rep. 645, the plaintiffs were nephews of the decedent, and had emigrated to this country without property or means, and were taken into his employment, and clothed and decently supported by him; they assisted him in his business, one for twenty, the others for six or eight, years. It was held that the estate was not liable.

In *Bowen v. Bowen*, 2 Bradf. 336, the plaintiff was a brother of the deceased, and had come to this country at his instance and expense; the deceased kept a small grocery store, and the plaintiff attended it, and was boarded and clothed by his brother. The surrogate of New York said: "In all the cases of this kind the evidence should be very clear that the services were performed by the claimant expecting to be paid for them, and that the decedent so understood it, or had reason to believe he was to be charged therefor." The claim was rejected. In this case stress was laid by the court on the facts, that although the claim was for five years' services, there was no proof that any claim was ever set up in the decedent's life-time, and there were no accounts kept.

The same subject came before the same tribunal, in *Kelly's Estate*, 1 Tucker, 28. The claimant was son of the testatrix, and the claim was for the board, etc., of the testatrix and her granddaughter. It appeared that on the death of the claimant's wife, the testatrix and her granddaughter came to live with him, and were treated like other members of his family. The claimant and the testatrix were persons of means. There was no proof of any agreement or understanding in respect to compensation. The surrogate says, "it is but justice to assume that he," the claimant, "anticipated social remuneration, for the services he might render, from the society of these two female relatives." A presumption exists against claims of this nature, brought forward after the death of one of the parties, and the courts have uniformly shown distrust



toward them. Our courts have rejected demands similar to this in many instances, and have admitted none, so far as I have been able to find, without affirmative proof of a distinct understanding to pay money." "It is, evidently, the policy of our law to discourage these claims for labour and services among and between near relatives, members of the same family. Litigation among parties, so nearly connected, may be almost said to be *contra bonos mores*. Relatives, between whom a deed for the consideration of 'love and affection' might be made, ought not to be encouraged to prosecute each other, or the estates of the departed, for board, clothing, lodging, education, or any of those pecuniary expenses which, in most families, are rendered without other expectation of reward than the enjoyment of mutual comforts and interests." Which is sound law, if not very good rhetoric.—*Albany Law Journal*.

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#### NOTES IN THE INNER HOUSE.

In the case of *Wardlaw v. Wardlaw's Trustees*, 23d January 1875, a question was involved which has been a question since the time of Sir Thomas Craig. The question is whether a person who has right to the fruits of an heritable estate which includes going collieries, is entitled to the annual value of the coal which is being worked. The Judges of the Second Division have decided that a liferenter by constitution has in the general case such a right. Of course the argument against that view is the obvious one, that the coal is part of the substance of the property, and consequently cannot belong to one who has only right to the fruits. The view which the Court took appears to have been founded on the presumed intention of the granter. If he grants a liferent of his property, knowing that it includes going collieries, it is to be presumed that he intends the liferenter to enjoy the rent of the coals as well as the rent of what may be a much less valuable portion of the subjects. Proceeding upon this idea of intention, the Court added a qualification to the doctrine above-stated, viz., that the liferenter was not entitled to the produce of the collieries when the coal was in danger of exhaustion. In such a case the granter, it was thought, could not have intended the liferenter to work the coal so as to bring it to an end. Another point was decided in the case, viz., whether the liferenter is entitled to grant new leases of the minerals. The Court held, that in the general case he was.

The decision of Lord Gifford in the *Dunoon Burgh Election* case, which we mentioned some time ago, has been affirmed in the First Division. The leading question was whether the provisions of the General Police and Improvement (Scotland) Act 1862 for a scrutiny and for the case of a double return have been repealed by the Ballot Act. One section of the Ballot Act provides that "all municipal elections shall be conducted in the same manner in all

respects" as in the burghs in Schedule C of the Act 3 & 4 Will IV. c. 76. In these last mentioned burghs the tribunal is the Court of Session, and in the case of a double return a new election is ordered. In police burghs, it is provided by the Act of 1862 that if a complaint is lodged the Police Commissioners shall remit to a committee of their number to inquire and report; and their report is final. In case of an equality of votes power is given to the Commissioners to determine which candidate is to be preferred. The Court has held that these provisions are still in force. Section 48 of the Act of 1862 (which contains these provisions) is not expressly repealed by the Ballot Act, while the sections in immediate juxtaposition to it, sections 46, 47, and 50, are expressly repealed. A difficulty was raised as to whether a committee of Police Commissioners could be regarded as a "tribunal," the term used in the Ballot Act. The difficulty was easily raised and as easily settled. A town council, or a committee of town council, which has power to decide whether an election is or is not valid is undoubtedly a tribunal *quoad hoc*. The Ballot Act has not taken away the powers of this tribunal; rather it has increased them by enabling it to call for the documents used in the election.

The Court, further, were of opinion that the clause of assimilation (section 20) of the Ballot Act did not apply to the case before them, because under the Police Act of 1862, in the case of an equality of votes, there is an *appointment* by the Commissioners, not an *election*. The decision is of importance, and it practically comes to this,—that populous places which have no common good, but whose whole revenues are derived from assessments, cannot enjoy the luxury of litigation about their elections, but must be content with the rough and ready but cheap and expeditious means of settling election disputes provided by the Police Act of 1862.

One question of more general importance under the Ballot Act was raised, but not decided in the case. It appears that the ballot papers were all stamped before the poll commenced. Now, in the Ballot Act the presiding officer is undoubtedly directed to stamp each paper at the time it is given to the voter. Whether the irregularity was of such a kind as to vitiate the whole election it was not necessary for the Court to say; but their Lordships did state that the irregularity was a very serious one and ought to be avoided.

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### Review.

*Jurisdiction and Punishments of Summary Criminal Courts.* By WALTER COOK SPENS, Advocate, one of the Sheriffs-Substitute of Lanarkshire. Edinburgh: T. & T. Clark.

FOR some time past there has been a growing feeling in the country that assaults accompanied by brutal violence, and more

especially cowardly and dastardly attacks by husbands upon wives and children, have been on the increase.

The experiment introduced by 26 & 27 Vict. cap. 44, had been successful in England in diminishing the number of robberies accompanied by violence to the person, and it seemed reasonable to suppose that the extension of the punishment of flogging to all cases of wife-beating and other cases of aggravated assaults would have the same beneficial result in the repression of these offences.

The present Government accordingly determined to investigate the matter, and instead of resorting to the expensive and tedious method of obtaining information, afforded by a Royal Commission, the Home Secretary, with a view to immediate legislation, issued a series of queries to the persons best qualified to give an opinion, viz., the magistrates of England, and the Sheriffs and Sheriffs-substitute of Scotland.

The following are the queries :—

“ I. Is the penal law against assaults of brutal violence, as distinguished from trifling assaults on the one hand and indecent assaults on the other, sufficiently stringent ; and if not, in what way should it be amended ?

“ II. Are there any kinds of assault which may now be summarily punished which should be declared triable only at Assizes and Quarter Sessions ?

“ III. Is it desirable that the maximum fine or the maximum term of imprisonment, which may be imposed for assaults by Courts of Summary Jurisdiction should be extended ?

“ IV. Should flogging be authorized for other kinds of violence than those within the provisions of the 26th & 27th Vict. cap. 44, especially in cases of assault on women and children ? and

“ V. Has flogging been efficacious in putting down the offences for which it is authorized as a punishment by 26 & 27 Vict. cap. 44 ? ”

This treatise, which bears a graceful inscription to the memory of the late Sheriff Bell, is the result of investigations suggested by these queries. The author, as the resident magistrate of a populous mining district, where he disposes annually of between three and four hundred summary criminal cases, is entitled to speak with some authority on the questions of which he treats ; and the remedies which he suggests are well worthy of the attention of the legislature.

In the first place, he thinks that the 413th section of the General Police Act of 1862, whereby it is provided that certain grave offences cannot be competently tried by a police magistrate, should be extended so as to embrace fifteen classes of crimes, which he enumerates.

We entirely concur with this recommendation. The citizen magistrate, sitting in the justice of peace or burgh police courts, has power to award a sentence of thirty days' imprisonment, or a fine not exceeding £5. It is plain, therefore, that he has not the opportunity of passing such a sentence as will tend to the repression of dangerous crime. Too often in such courts the wife-beater is let off with a trifling fine, which is paid by his friends, and goes to reduce the police assessment of the district.

We agree with Sheriff Spens that the offences which he enumerates, and which include assaults committed by a husband against a wife or child, on police in the execution of their duty, on magistrates or judges, and assaults characterized by biting or kicking, or where serious injury or permanent disfigurement result, should be remitted to the Sheriff.

The second part of the work is devoted to a learned and interesting discussion upon the extent of the summary jurisdiction of the Sheriff at common law, and apart from statute.

The expediency of corporal punishment, which is considered in the third part of the treatise, is summed up in the following paragraph, with which we entirely agree.

"As to the lash : I think it only right, that in all aggravated cases of assault, in wilful fire-raising to the imminent risk of life, and housebreaking when armed with lethal weapons, the Supreme Court should have the power of awarding it, which infers, as the Court of Justiciary can only try cases with juries, that such intervention will occur. I condemn the idea of citizen Magistrates having this power. I go further, and disapprove of the lash being awarded in any case without the intervention of a jury ; and even after a verdict of guilty by a jury, I would leave the matter in the discretion of the Judges. With the intervention of a jury, I do not think Sheriffs would go far wrong in the exercise of a discretionary power ; but still, on the whole, I think that such discretionary power had better be entrusted only to the Supreme Court. In arriving at this conclusion, I am to a certain extent influenced by the opinion that the infliction of such punishment by the Supreme Court would probably have a more telling effect in the way of example and deterrent throughout the country. To make the lash a common punishment would, I have no doubt, make it inefficacious."

We hope we have said enough to show that the topics treated by Sheriff Spens are interesting and instructive, not only to the profession, but to the community at large. They are treated in a style which is pleasing and graceful ; and the whole work bears evidence of having been written after a careful and mature consideration of the materials which have been afforded during a diligent research.

During next Session these subjects will be before the Legislature, and this work should be in the possession of every member of Parliament.

It contains in a convenient form a statement of the present powers and jurisdiction of our inferior criminal Courts, as well as suggestions for their reform of very considerable weight.

A copious appendix contains, with other matter, a curious and interesting extract from the records of the Hamilton Court of Regality of a criminal process for the crimes of murder and rioting in 1710.

We hope that Sheriff Spens will be encouraged by the success of this treatise to pursue his investigations on summary criminal jurisdiction in a larger work.

Meantime we can cordially commend the present treatise to the attention of our readers.

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## Notes of English, American, and Colonial Cases.

**PRINCIPAL AND AGENT.—Rules of Stock Exchange—Defaulting Broker—Liability of Principal.**—Plts., brokers on the Stock Exchange, who had, at the request of deflt., contracted for the purchase of shares for him, were on the 13th of July, the "carrying over day" for the 15th, instructed by him to carry over or continue the contract from the 15th till the 29th of July, the next account day. On the 15th they paid for him (as was necessary in order to have the contract carried over), the difference on the shares at the price of the 13th, amounting to £1688. On the 18th of July, plts., by reason of many persons for whom they had entered into contracts failing to meet their engagements, became defaulters on the Stock Exchange, whereupon, in accordance with the rules of the Exchange, all their bargains were closed and made up by the official assignees at the prices of that day. The price of the shares purchased for the deflt. having fallen, the amount due in respect thereof (including the £1688 differences) was £6013, which plts. then became liable to pay to the official assignees, and now sought to recover from deflt. :—*Held* that plts.' insolvency having been brought about by want of means to meet their other primary obligations, and not by reason of their having entered into any contract on behalf of deflt., no promise could be implied on the part of deflt., as their principal, to indemnify them against the consequences of the enforcement of the Stock Exchange rules with regard to defaulters, and that, therefore, plts. could only recover from deflt. the sum of £1688, the amount of the differences they had actually paid for him.—*Duncan v. Hill, and Same v. Beeson* (Ex. Ch.), 42 L. J. Ex. 179.

**RESTRAINT OF TRADE.—Sufficiency of consideration.**—In the year 1864 R. G., a surgeon-apothecary and man-midwife, engaged T. B., a medical student, as his assistant, at a salary. In 1870 T. B., at R. G.'s request, executed a bond by which he bound himself to pay R. G. the penal sum of £1000. The bond then recited that R. G. some time since took T. B. into his employ and confidence as an assistant in his profession or business, which employment was to continue so long as the parties to the bond should agree, and that for the aforesaid consideration T. B. had agreed to enter into the same bond. The condition of the bond was that it should be void in case T. B. did not carry on the business of a surgeon-apothecary or man-midwife within the parish of N., or within ten miles thereof (excepting at L.), during so long as R. G. or his successors in the business should carry on the same. Later in 1870 R. G. discharged T. B. from his employment, and in 1874, T. B. having qualified himself to practise as a surgeon-apothecary and man-midwife, commenced business about four miles from N. On motion for an injunction by R. G.,—*Held*, that there was sufficient consideration to support the bond, and the injunction was granted.—*Gravelly v. Barnard*, 43 L. J. Rep. (Ch.) 659.

**INNKEEPER.—Liability of manager holding license for company.**—The salaried manager of an hotel belonging to a company is not an innkeeper so as to be by law responsible for the goods and property of the guests, although the usual license under 9 Geo. IV. c. 61 has been granted to him personally.—*Dixon v. Birch*, 42 L. J. Exch. 135.

**APPROPRIATION OF PAYMENTS.—Contributory—Debt to bank.**—The principle of appropriation of payments laid down in *Clayton's Case* (1 Mer. 572) applies to dealings between a company and its bankers, so that a former shareholder who has transferred his shares is exonerated from contributing to the company's debt to its bankers, if before the winding up sufficient money had been paid to the bank to cancel what was due to the bank when such shareholder ceased to be a member.—*Re The Devonport, etc., Mill Co. ; Bateman's Case*, 42 L. J. Ch. 577.

**WINDING UP.—Assurance company—Proof by policy-holders.**—An assurance

company having been ordered to be wound up :—*Held*, that a policy-holder was entitled to prove for the sum which a solvent assurance office, having the same rate of premiums and the same extent of proprietary capital as the company in liquidation would require him to pay, in order to obtain a policy of the same amount and under the same conditions at the same premium—*Bell's case*, Law Rep. 9 Eq. 706, followed. *Lancaster's case* (Albert Arbitration), Solicitors' Journal, December 9, 1871, vol. xvi. p. 103, disapproved of.—*Re The English Assurance Company*; *Holdich's Case*, 42 L. J. Ch. 612.

COMPANY.—*Voluntary liquidation—Compromise and recommencement of business after winding up—Dissentient shareholders—Transfer of shares to liquidator.*—The M. Company was wound up and reconstructed by the formation of the M. Corporation, the shareholders taking shares in the corporation in exchange for their shares in the company, and the corporation taking over the company's assets and liabilities. The corporation failed to indemnify the company, and was itself wound up. Its capital was fully called up in the liquidation, and it still owed large debts, besides the claim of the company against it for indemnity. The company's capital had not been fully called up. It owed no debts, and had a balance of cash in hand. Under these circumstances an agreement was entered into between the liquidators, that the company should take the assets of the corporation, paying the creditors of the corporation 4s. in the pound, and retaining what else they might make of them. There was evidence that the assets, if realised carefully, might more than pay the company's claim in full. If sold immediately, the assets would probably pay about 3s. in the pound to all. MALINS, V.C., having sanctioned this arrangement, giving dissentients the option of taking the present estimated value of their shares, certain executors holding shares in the company appealed from the order. Their appeal was dismissed with costs.

Though a transfer of shares to the liquidator in a voluntary winding up, under an arrangement whereby the shareholder retires from the company, will not absolve him from liability to existing creditors, it will relieve him from any liabilities incurred under an arrangement of which his retirement forms part, and from the costs of the liquidation.—*In re Marine Investment Co. Ex parte Poole's Executors*, 42 L. J. Ch. 620.

COMPANY.—*Transfer of shares—Irrregularity—Directors interested—Costs.*—In 1859, B., who was a director of a company formed under 7 & 8 Vict. c. 110, sold all his shares to M., the purchase money not to be paid if the company was wound up within two years. The company's deed of settlement provided, that if eighty per cent. of the subscribed capital should be lost, the company should *ipso facto* be dissolved, and it required, on a transfer of shares, a previous notice to the directors; a certificate of approval by them of the transfer; also that the transferee should execute within a month, at the office of the company or at such other place as the directors should reasonably require, a deed of covenant to abide by the rules of the company. The shares could be transferred only by deed of transfer executed by the transferor. Shortly before the sale of B.'s shares the directors had received an accountant's report of the state of the company's affairs, from which it appeared that eighty per cent. of the gross capital had been lost, but it appeared also that the goodwill and connection of the company was of considerable value, either as a basis for further operations or on a transfer to another company. This report was not communicated to the shareholders. But there was a change of directors, B. and his co-directors transferring their shares to and retiring in favour of M. and others, who were also directors of a banking company. No formal notice of the intended transfer by B. was ever given, nor was any deed of covenant ever executed by or demanded of M. But B. executed a deed of transfer, and the transfer was subsequently approved by the new board of directors, M. himself being present, and notice of the transfer was sent to the registrar of joint-stock companies :—*Held* (by the House of Lords), that the transfer was valid, though irregular, that as M. and the other new directors had taken upon themselves to act and were at various meet-

ings recognised by the company as directors, their consent to the transfer was, by 7 & 8 Vict. c. 110, s. 30, rendered a valid consent, although their qualification had been irregularly obtained, and that it was a matter for the directors, and no concern of B.'s, whether the deed of covenant was or was not demanded of M.

*Held, also*, that the transaction was not affected by the loss of capital, as the value of the goodwill might have turned the balance, if a proper estimate had been put upon it, and the goodwill was an asset of the company. And whether the directors ought or not to have wound up the company at that time, the transfer was not invalidated, since the company was carried on for nearly two years afterwards.

LORDS CHELMSFORD and COLONSAY dissented from this decision, and the appeal was dismissed without costs, though fraud had been imputed and not sustained.—42 L. J. Ch. 586.

**ADULTERATION OF FOOD ACT.**—*Proof that article was represented to be unadulterated—Guilty knowledge.*—The Adulteration of Food, &c., Act, 35 & 36 Vict. c. 74, by s. 2 enacts that every person who shall sell any article of food or drink with which to the knowledge of such person any ingredient or mineral injurious to the health of persons eating or drinking such article has been mixed, and every person who shall sell as unadulterated any article of food or drink, or any drug which is adulterated, shall be liable to (certain prescribed penalties). By s. 3, any person who shall sell any article of food or drink, or any drug, knowing the same to have been mixed with any other substance, with intent fraudulently to increase its weight or bulk, and who shall not declare such admixture to any purchaser thereof, before delivering the same, and no other, shall be deemed to have sold an adulterated article of food or drink or drug, as the case may be, under this Act. Appt. went into the shop of respt., a provision and butter dealer, and asked for a pound of butter at 7d. A pound of butter was handed to him, in the presence of respt., which was afterwards found to be adulterated with different fats, not necessarily injurious to health : —*Held*, first, that there was sufficient evidence under s. 2 of a sale of the butter as unadulterated ; secondly, that it was not necessary under s. 3 to prove that respt. knew the butter had been mixed with some substance, with intent fraudulently to increase its bulk.—*Fitzpatrick v. Kelly*, 42 L. J. Mag. Ca. 132.

**AUCTION.**—*Goods withdrawn from sale—Liability of auctioneer—Indemnity.*—Deft. advertised in newspapers that a sale by auction would take place on a particular day in a country town. He also circulated catalogues specifying the articles to be sold. Plt. attended the sale, intending to buy certain articles specified in the catalogue, but on the day of sale they were withdrawn by deft. : —*Held*, that there was no implied contract by deft. to indemnify plt. against the expense and inconvenience which he had incurred.—*Harris v. Nickerson*, 42 L. J., Q. B. 171.

**COMPANY.**—*Liability of transferee upon an implied contract to indemnify transferor against loss on the shares.*—On the 4th of September 1865, plt. sold to deft. twenty shares in a joint-stock company. On the 8th he executed a transfer to deft., who paid the purchase money, and caused the transfer to be registered by the company on the 4th of December. On the 20th of March 1866, deft. transferred the shares to M. On the 18th of April 1866, the company stopped payment, and on the 8th of May 1866, was ordered to be wound-up. On the 24th of July 1866, M. was placed on the A. list of contributories, being the list of existing members. On the 30th of October 1866, M. executed a deed of inspectorship. An order was made upon M. to pay a call of £40 a share, but he did not pay, and the liquidators failed to get any payment out of his estate. On the 6th of December 1867, plt. and deft. were placed on a B. list of contributories as past members in respect of the shares. On the 27th of December 1866, deft. executed a deed of inspectorship, under sec. 192 of the Bankruptcy Act, 1861, which was registered on the 29th of December 1867. On the 20th of March 1869, the Court ordered deft. to pay a call of £40 a share, but he did not do so, and on the 10th of May plt., in pur-

stance of an agreement of compromise made between himself and the official liquidator, paid the sum of £15 per share in respect of the twenty shares sold by him to the deft. :—*Held*, that he had a right to recover from the deft. the sums paid, upon an implied contract by the deft. to indemnify him against loss and liability upon the shares transferred.—*Kellock v. Enthoven*, 42 L. J., Q. B. 174.

**MARINE INSURANCE.**—*Prospective freight*—*Total loss*—*Notice of abandonment*.—Notice of abandonment need not be given where there is nothing which on abandonment can pass or be of value to the abandoner. Where there is a constructive total loss of the ship, and it is impossible for its owners to earn the chartered freight, and there is therefore an actual and not a constructive total loss of such freight, no notice of abandonment is necessary. No such notice is necessary where the ship never having been ready to receive the chartered cargo there was nothing to abandon to the underwriter on freight. What amounts to constructive total loss of ship, and what is sufficient notice of abandonment of freight.—*Rankin v. Potter*, H. L. 42 L. J., C. P. 169.

**SHIPPING.**—*Freight*—*Right to lump freight where part of cargo lost*.—By charter-party, the ship was to be loaded with a full cargo, and to have a deck cargo, and being so loaded was to proceed to London, and "deliver the same on being paid freight as follows: a lump sum of £315. . . . the freight to be paid in cash, half on arrival, and remainder on unloading and right delivery of the cargo." The ship arrived in London with the whole of the cargo, with which the charterer had loaded her, with the exception of the deck load, which had been lost during the voyage by one of the excepted perils in the charter-party, and without any default on the part of the master or crew :—*Held*, that the shipowner was entitled to the whole of the lump freight without deducting the proportion of freight payable in respect of the deck load which had been lost.—*Robinson v. Knights*, 42 L. J., C. P. 211.

**JOINT-STOCK COMPANY.**—*Debenture*—*Negotiable Instrument*.—A company incorporated under the Companies Act 1862 (25 & 26 Vict. c. 89) issued a debenture under the seal of the company and countersigned by two of the directors and the secretary. By it the company promised, subject to conditions endorsed, to pay to the bearer £100, on the 1st of May 1872, or on any earlier day on which it should be entitled to be paid off or redeemed according to the conditions. By the conditions the company contracted not only to pay the money, but also to cause a portion of the debenture to be drawn in a stipulated manner. Of late years a custom of trade has prevailed to treat such bonds as negotiable instruments :—*Held*, that the debenture was not a negotiable instrument, and that therefore, where it had been stolen from the owner, no action could be maintained upon it against the company by a person who claimed through the thief who stole it.—*Crouch v. The Credit Foncier of England*, 42 L. J., Q. B. 182.

**SUCCESSION DUTY.**—*Alienation by remainderman to body corporate*—*Alienee liable as successor*.—Testatrix by will, made in 1839, devised real property to one for life, and after his death to a remainderman in fee, and died in 1841. The remainderman, a cousin of testatrix, died in 1870, having previously sold his reversion in fee to a corporation. The tenant for life died in 1872 :—*Held*, on an information against the corporation, first, that the corporation, upon the death of the tenant for life, were "successors" within ss. 2 and 27 of the Succession Duty Act, 1853, and were liable to pay succession duty upon the full value. Secondly, that if necessary the Court would have decided the death of the remainderman to be immaterial, and the rate of duty to be the same as would have been payable by him if he had survived the tenant for life without selling, but that at all events the Crown had made out a *prima facie* case to duty at that rate, since the Crown need not prove the death of the remainderman, nor who was his heir; and that if events had happened by which the duty would be less, the corporation must prove them.—*Solicitor-General v. The Law Reverendary Interest Society*, 42 L. J. Ex. 146.



**ELECTION.**—A will made in the lifetime of R., affected to give to A. personality which in truth belonged to R., and it also gave legacies to R.'s children, and by a codicil thereto, made after R.'s death, additional benefits were given to R.'s children :—*Held*, that R.'s right to the above-mentioned personality having devolved on his children as his next-of-kin, they must elect between on the one hand making satisfaction to A. out of their father's personality, and on the other hand abandoning all the benefits which they took as well under the will made in R.'s lifetime as by the codicil made after his death.—*Cooper v. Cooper*, H. L., 44 L. J. Rep., Ch. 6.

**LEGACY.**—*Specific or demonstrative—Ademption.*—A testatrix bequeathed all "her" money which should be "invested" at her decease to a trustee upon trust, in the first place to pay thereout her debts and funeral and testamentary expenses, and in the next place, to pay to her nephew H., for his life, the sum of £3000, invested in Indian security." At the date of her will the testatrix had bonds of the East Indian Loan of the value of £3000, but these were redeemed by the Indian Government before her death, and at her death she had no money invested in Indian securities :—*Held*, that the legacy was demonstrative, not specific—*Mytton v. Mytton*, 44 L. J. Rep., Ch. 18.

**REVENUE.**—*Income tax—Foreign corporation with agency in England not a person residing in the United Kingdom.*—A Turkish corporation, which by the law of Turkey was established as a state bank for the Ottoman Empire, with its seat at Constantinople, and power to establish as many branches and agencies as it might think fit, established a branch or agency in London, where the ordinary business of bankers was carried on under the management of a committee of persons who resided in England and were elected by the shareholders :—*Held*, that the corporation did not "reside in the United Kingdom" within the meaning of 16 & 17 Vict. c. 34, s. 3, schedule D ; and that for the purpose of being assessed to the income tax the committee were not bound to make a return of the profits accruing to the bank elsewhere than within the United Kingdom.—*The Attorney-General v. Alexander*, 44 L. J. Rep., Ex. 3.

**PRINCIPAL AND AGENT.**—An estate or house agent, to whom instructions are given to procure a purchaser for property, has not, though the price is named in the instructions, authority to enter into a binding contract with a purchaser to sell such property.—*Hamer v. Sharp*, 44 L. J. Rep., Ch. 53.

**TRADE MARK.**—*Denotation of article—Trade Mark in gross—Spurious article.*—The inventor of a sauce gave it the name of the Licensed Victualler's Relish, and designed a trade mark for labels on the bottles containing it, and employed his son to sell it. He permitted his son to describe himself in his circulars and invoices as the sole proprietor of the sauce. The son became bankrupt, and his trustee sold his interest in the sauce and its trade mark to plts., who now sought to restrain the inventor from infringing the trade mark. It appeared that plts. did not know deft.'s recipe, but made a sauce which their witnesses deposed to be undistinguishable from deft.'s :—*Held*, that a trade mark could not exist in gross, and that as plts. did not know the recipe for the original article, they could not have a right to affix the trade mark to a sham article for the purpose of imposing on the public.—*Cotton v. Gillard*, 44 L. J. Rep., Ch. 90.

**TRESPASS.**—*Mischiefous animal—Knowledge by owner of vicious temper—Negligence—Remoteness of damage.*—Defts. were occupiers of a plot of land, which was separated from a field of plt.'s by a wire fence. Deft.'s turned into their plot of land an entire horse ; and plt. put into his field a mare. Deft.'s horse and plt.'s mare got together upon either side of the fence, and the horse by biting and kicking through the fence injured the mare. The horse did not trespass upon plt.'s field by crossing the fence. Upon previous occasions he had been watched, and plt. had warned defts. to keep him away from the mare. The plt. having sued for the injury to the mare, the County Court judge held that there was no case to go to a jury :—*Held*, that plt. was entitled to judgment ; for there was evidence that a trespass had been committed and the damage was not too remote.—*Ellis v. The Lofus Iron Company*, C. P. 24.

## The Scottish Law Magazine and Sheriff Court Reporter.

### SHERIFF COURT, ABERDEEN.

Sheriff COMRIE THOMSON.

HENDERSON v. LOVIE.—4th December 1874.

*Poor Rate—Liabilities of Outgoing and Ingoing Tenants.*—This was a case in the Small Debt Court, in which George Henderson, farmer, Pitcow, Udney, sued Alexander Lovie, farmer, Nether Boyndlie, Fraserburgh, for payment of £7, 17s. 8d., per account produced, being the balance of the value of the crop on the farm of Towie for the year 1873, and of certain buildings—both handed over to the defr. by the pursuer. The circumstances are more fully disclosed in the following judgment of the S.-S. :—

"This case appears to raise an interesting, difficult, and—so far as I know—a novel question in regard to Poor Law assessment. That it is novel arises, I suppose, from the circumstance that the matter in dispute is one generally made the subject of special arrangement. The pursuer is the outgoing, and the defr. the incoming, tenant of a farm of considerable size. They appear to have comfortably settled their mutual claims arising from that relationship, with this exception, that the defr. maintains that he is entitled to retain from the pursuer one-half of the Poor Rates payable by 'the tenant or occupant' of the farm, for the year Whitsunday 1873 to Whitsunday 1874. I have had considerable difficulty in arriving at a decision satisfactory to my own mind, but I have come to be of opinion, notwithstanding that there is much apparent equity in the view urged for the defr., that, as matter of legal construction of the lease and Act of Parliament, the pursuer is entitled to prevail.

"The parochial assessment in question was laid on for the year from Whitsunday to Whitsunday. The person who has to pay it is the tenant or occupant. The question therefore is, whether the pursuer or the defr. is to be considered as holding that position. The defr. maintains that he did not become tenant or occupy the farm till one-half of the year had run, and that therefore he is liable only for one-half of the rate. There is nothing peculiar in the terms of the lease. It runs 'for the space of nineteen years from and after the term of Whitsunday 1854.' The rent is payable at two terms in the year, Martinmas and Whitsunday, after reaping the crop, 'beginning the first terms thereof as at Martinmas 1855, and the next term's payment 1856, both for crop and year 1855.' The outgoing tenant is bound at the Whitsunday of removal from the houses, grass, turnip break, and other green crop, to give over to the incoming tenant the whole grass and dung on the farm, the value to be ascertained by arbiters. The former is also bound to allow the latter to take the whole of the grain crop on the farm at valuation, upon the intention to do so being intimated timeously to the outgoing tenant. In the present instance that intimation was duly given. It is plain that the pursuer here is liable for the rent crop 1873, the last moiety of which would not be payable until Whitsunday 1874. But the poor assessment is not imposed for crops, nor with reference to the conventional terms at which rents may be payable, but for periods of twelve months, and if the defr. became only in the legal sense 'tenant or occupant' of the farm at Whitsunday 1873, he is liable for the rates imposed for the year succeeding that date. As I have already indicated, I am of opinion that that is the position of the defr. His date of entry was identical with the date of the expiry of the pursuer's lease. They could not both be tenants at the same time, for with his predecessor's lease the defr. had nothing to do. The defr. would doubtless be dealt with by the landlord as his tenant from Whitsunday, and accordingly the assessment was laid on him as bearing that character. The various arrangements rendered necessary by the nature of the subjects, under which the outgoing tenant was entitled to

reap the grain crop, if his successor did not claim it at valuation, do not seem to me to continue his tenancy beyond the natural termination of the lease as fixed by that document. The defr. was truly the tenant from Whitsunday, subject to the condition, that until after harvest his predecessor was to be allowed to do what was necessary for the maturing and ingathering of the crop which he had sown.

"The above being the view which I have adopted, there must be decree. Some hardship may be supposed to attend this judgment, but, in the ordinary case, the matter will adjust itself from an equitable point of view, by the same result following in favour of the present incoming tenant when his lease expires. It may be noticed that no light is to be gathered on the subject from what happened at the commencement of the pursuer's lease, because at that time the poor of the parish were supported by voluntary contribution. The policy of the law in the matter of assessment for public purposes seems to me to be, for good reasons, somewhat artificial, and is against the dividing and apportioning of single year's assessments, where, as here, the assessment is laid, not upon means and substance, but upon owners and tenants or occupants jointly."

*Act.—A. E. Smith.—Alt.—C. Duncan.*

#### PERTH SHERIFF SMALL DEBT COURT.

JOHN WILSON v. CHARLES LAMB AND DAVID SOOT.—*December 1874.*

*Wages of Farm Servants—Intimated Orders.*—The following notes issued by his Lordship explain the case :—

"*Perth, December 1874.*—This action is founded on the following statement :— '£6, Os. 11d. sterling, claimed, being, first, the sum of £3 sterling, contained in and due by an order granted by the defr. Charles Lamb upon the defr. David Soot in favour of the pursuer, dated 22nd November 1873, payable at the term of Whitsunday last, and was sent to the defr. David Soot in or about the month of January last, and is still or ought to be in his possession. Item—the sum of £3, Os. 11d. sterling, contained in and due by another order granted by the said Charles Lamb upon the said David Soot in favour of the pursuer, dated said 22nd November 1873, and was also sent to the defr., the said David Soot, and is still or ought to be in his possession; and which two sums of £3 and £3, Os. 11d. the defr. David Soot retained, or at all events was bound to retain, from the wages of the defr. Charles Lamb, in terms of said orders intimated as aforesaid.' The defr. Soot produced the two orders, which are of the following tenor, and are duly stamped:—'Forteviot, Nov. 22, 1873. Mr. D. Soot, Kinpurney, Newtyle. Sir,—Debit my amount for wages with the sum of £3, and which pay to John Wilson, grocer, Forteviot, at *Whitsunday first*, 1874. (Signed) CHARLES LAMB.' 'Forteviot, Nov. 22, 1873. Mr. D. Soot, Kinpurney, Newtyle. Sir,—Debit my account for wages with the sum of £3, Os. 11d., and which pay to John Wilson, grocer, Forteviot, at *Martinmas first*, 1874. (Signed) CHARLES LAMB.' The defr. Lamb of course admits the two sums being due the pursuer, but joins the pursuer in pleading that the sum in the first order payable at Whitsunday was retained from his wages by his master, Mr. Soot, expressly to meet this order. The facts are—1st, Lamb, a married man, engaged as servant to Mr. Soot at Martinmas 1872; for twelve months, at the wages of £29, with the usual perquisites. 2nd, There is no proof that it was agreed on that a moiety or any part of his wages was to be paid at Whitsunday. It is not the practice for farm servants to be so paid, and the reverse would encourage immediate desertion. The common law right to demand half-year's wages, independent of bargain, has on proof of practice been more than

once negated in this Court in the case of farm servants in Perthshire engaged for a year. Lamb was a servant on one of Mr. Soot's farms situated in Forfarshire. The agent for the pursuer offered to prove that according to the practice in Forfarshire farm servants are entitled to receive, and do receive, the half of their yearly wages at the term of Whitsunday; but it was unnecessary to enter on that question as the case now presents itself. 3rd, At Whitsunday the sum earned by Lamb for the time (not discounting £1, generally taken from the winter season of the year, as less remunerative to the master, was £14, 10s.); but he had received certain sums during the half-year, leaving a sum at his credit (without the deduction foreshaid) of £8, 10s. 4th, At Whitsunday Mr. Soot, through his grieve, paid all his other servants the full sums then at their credit, but paid Lamb only £5, 10s., retaining £3. Lamb swears that this sum was expressly retained to meet Wilson's order. The grieve, corroborated by Mr. Soot, swears it was only as a guarantee that Lamb would make out his term of service, as they had not such confidence in him as they had in the other servants, he having previously deserted another master. This doubt, unfortunately, was realised by Lamb's subsequent desertion. 5th, Lamb, after receiving further payment of £1, deserted his service in July. Mr. Soot took no legal steps to enforce the contract, or to obtain compensation for the loss occasioned by his desertion. Neither did Lamb or the present pursuer adopt any proceedings to recover wages. 6th, An arrangement was on 18th July made whereby Lamb paid the grieve, acting for Soot, the sum of £3, and received the following stamped receipt:—'Received from David Scrimgeour the sum of three pounds sterling, as compensation for Charles Lamb breaking terms with me. July 18. Received £3. (Signed) WILLIAM POWRIE.' 7th, This arrangement was completed between Lamb's wife and the grieve. There was no computation of the sum then at the credit of Lamb, or the amount of loss incurred by his desertion. Lamb's wife, who was examined, swore that it was she who paid the money, and it was understood by her that the £3 of the Whitsunday term was still to be paid to Wilson under the first order; but the grieve swore that his understanding was that, in addition to the £3 so paid, the whole wages were to be forfeited. But nothing to this effect seems to have been stated on either side. At the date of the payment there was at the credit of Lamb, the servant (not deducting the £3 supposed to be retained), the sum of £5, 7s., or deducting the £1 discounted for the winter season, £4, 7s., so that, adding the £3 paid for compensation, there was paid or retained on account of compensation the sum of £7, 7s. Lamb's wife carried to the grieve the receipt written by herself. She swore it was made out in consequence of an agreement made between her father and the grieve. Both parties dispensed with the examination of the father, and though he had been called in all probability there would have been contradictory oaths between him and the grieve as to the terms of the bargain. These circumstances raised a very difficult question whether the £3 at Lamb's credit at Whitsunday was allotted to Wilson, and remained unaffected by the subsequent desertion of Lamb and the settlement of compensation arising from that desertion. 1st, It is clear that the giving and delivering of the order to Soot did not render him *directly* debtor in the amount to Wilson. It was of the nature of an intimated assignation. It might rank prior to a subsequent arrestment or other order. 2nd, The S.-S., from the coincidence of the sum in the order and that retained, and that all the other servants were paid in full, is strongly impressed that the sum was so retained to meet the order first in date. Soot and the grieve may have had a further reason for retaining the sum, but it is not proved that it was expressly retained to meet that other contingency. Had it been paid Wilson, Mr. Soot would have had no action of repetition though Lamb had subsequently deserted. So, too, had Soot paid the sum to another creditor, or to Lamb himself, he might have been liable to Wilson. 3rd, But the sum being still in the hands of Soot at the time of Lamb's desertion, there can be no doubt, as a general rule, that that sum and all the wages subsequently earned were forfeited, and no obligation rested on Soot to Wilson any more than to Lamb.

4th. The S.-S. is therefore forced to consider whether the settlement in July, after the desertion, and payment of £3 as compensation, saved the £3 retained in May and the wages subsequently earned from forfeiture. There is much in the peculiar wording of the receipt and the whole circumstances in favour of the servant and the pursuer Wilson, that the £3 paid was in full of compensation, leaving the £3 to be paid over to Wilson. Nevertheless, seeing that the wages, including the £3, were forfeited by Lamb's desertion, the burden of proof rested on the pursuer to show that the £3 paid was not only in full of compensation, but left the £3 retained at Whitsunday to be paid over to Wilson. There is no direct evidence of such agreement, so on the whole the S.-S., with no small difficulty, has reached the conclusion that the pursuer can only get decree against Lamb, and that Soot must be assoilzied, but without costs.

"HUGH BARCLAY."

"Perth, 25th December 1874.—The foregoing notes being issued, and the case further heard, the solicitor for the pursuer Wilson raised and argued an additional point—namely, that the orders being of the force of intimated assignations, Soot could not pay Lamb farther than subsistence money, and his paying him £5, 10s. at Whitsunday, in face of the assignations, rendered himself liable at least to the extent of the £3 retained, being the amount of the first order. Further, he averred that desertion did not necessarily imply total forfeiture of wages earned, but only to the extent of damages thereby actually occasioned to the master. The S.-S. has taken time to consider these new pleas, and he cannot see in them grounds to alter his former opinion. Doubtless, had Lamb fulfilled his contract, and Soot paid him his full wages, the pursuer's contention would have been good. But Lamb having deserted his service, as a general rule he forfeited the whole of his wages. A party violating his part of a contract cannot demand the other party to fulfil his part. In cases of dismissal there is room for allowing a portion of the wages earned, depending on the amount at the time and the extent of the servant's *delict*, which resulted in the dismissal. Even supposing that the same rule applied to desertion, the question could only have arisen on a complaint by the master against the servant for compensation, or of the servant against the master for wages. Neither party resorted to this step, and the pursuer stands precisely in place of the servant. The whole question therefore comes back to what was formerly dealt with—whether the servant paying the master £3 as compensation, this was to entitle him to his wages earned, or any part of them, or whether the whole amount earned was to be forfeited in addition to the £3. The proof of the first position rested with the pursuer, and in this he has certainly failed. The presumptions, certainly, are strong for the pursuer, only it would be somewhat strange were the servant to pay the master £3 the one day and get from him a larger sum the next. Decerns against Lamb, with costs. Assoilzies Soot, without costs.

HUGH BARCLAY."

Act.—Mr. Robert Mitchell.—Alt.—Wm. Young, Wm. MacLeish.

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*Note.*—Owing to the pressure on our space, "Remarks on Recent English Cases" is held over till next month.

THE

# JOURNAL OF JURISPRUDENCE.

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## THE HISTORY OF THE SHERIFF COURTS.

By J. DOVE-WILSON, Esq., Advocate, Sheriff-Substitute, Aberdeen.

[READ BEFORE THE PHILOSOPHICAL SOCIETY OF ABERDEEN, FEB. 2, 1875.]

IN a work which I published some six years ago I described the existing constitution of the Sheriff Courts, endeavouring to answer the two questions:—What it was that they professed to do? and how it was that they did it? The necessity which I lay under—for practical purposes—of answering those two questions with as much brevity and clearness as was possible, prevented me from then entering on historical matters further than was occasionally requisite in order to make the statement intelligible. But the historical part was by far the most interesting, and while investigating the present condition of the Courts, there grew under my hands a quantity of materials useful only for illustrating the past. These I have from time to time supplemented by farther investigations, and now I propose to answer, as best I can, the question how it was that the Sheriff Courts have come to be here. The reply will have an interest for students of law, and possibly for some of its practitioners. I hope that it may also have a wider interest. As a chapter in the history of civilization, describing the progress of an important institution from the rudest materials to a comparatively high development, it may interest many to whom the purely legal discussions would be merely an affliction.

I must, however, venture to assume on the part of my hearers a general knowledge of the features of the Sheriff Court system: I shall not ask for much. All Scotsmen, I think, must know that our Sheriff Courts are not, as the English County Courts are, things of yesterday, regulated by complete statutory codes, and with all their parts forming a fairly harmonious whole, but are ancient institutions, and though still full of vigorous life, full also of all manner of anomalies. Though local Courts, their jurisdiction

in some respects rivals that of the highest Courts. At other times their jurisdiction falls short at strangely absurd limits. They may, for example, settle the right to any amount of money, and yet cannot decide as to the property of a square yard of land. In applying deeds they may settle questions of law involving any extent of pecuniary liability, and yet be stopped by inability to determine the simplest questions of fact, involving perhaps only a few pounds. Not less startling are the anomalies in their modes of proceeding. Matters involving the merest trifles will be found to be regulated with the utmost precision, and matters of the highest importance left with the loosest vagueness. The time, for example, at which some pleading may require to be lodged will be found to have been an object of most anxious solicitude to the legislature, while on points even affecting the liberty of the subject, it will be found that no old popular Court that ever met on its moot hill was freer from written law. And if what the Sheriff Courts may do, and how they may do it, are subject to such anomalies, not less strange are the relations in which they stand to the higher Courts under whose control they work. A man may discover that he has been fined by the Sheriff a hundred pounds, or has been sentenced to pass a year or two of his life in prison, and that he has no appeal; while another, who perhaps complains that he has been wrongously deprived of a half-crown snuff-box, may find that he possesses the ruinous privilege of appealing even till he reaches the House of Lords.

It is almost self-evident that the system could never have had a deliberate constructor. Time was when men were satisfied to assume that at some distant period a great legislator had deliberately planned and laid out an institution, and that the anomalies were the growth of subsequent times. Every country almost has its great pre-historic legislator, and just as Greece had its Solon and Lycurgus, so had we for centuries of the Middle Ages our Malcolm and our David, to whom the framing of the good old laws were attributed. Perhaps to them was never consciously attributed the institution of the Sheriff Courts, because our ancestors seem little to have troubled themselves about the origin of our institutions. But for long in England it was received as an adequate explanation of the origin of the county system, that Alfred the Great had divided out the country into shires, and provided each with its appropriate staff of officers. Plainly no such heroic solution of the question will suffice. As assumptions are discarded, and facts are investigated, no trace of a deliberate origin for such institutions is to be found. To use language familiar in other departments of science, such institutions as our local Courts are due to a process of evolution, whereby from old, and often widely different institutions, the present have been gradually developed.

In tracing this process of evolution, it will necessarily be only the leading currents that can be followed, and the leading features that

can be noticed. A merely chronological narrative of the changes that have befallen the Sheriff Courts would have no value and no interest. It is only by connecting the changes together by the ideas that have been at their root, that they can have either the one or the other; and it is better to run the risk, unavoidable perhaps in the first attempt, of classifying the facts, to some extent erroneously, than to leave the attempt unmade.

The territorial divisions to which our Sheriff Courts are attached are far older than the Courts themselves. The origin of these divisions is obscure. But if there is anything clear about the division of the country into counties it is that it was not made purposely. There is no such thing known in history as a division of Scotland into districts for judicial or administrative purposes. A glance at a map will show at once that there never could have been such a thing. The enormous variation in size, the inconvenience and irregularity of their shape, so great that their fragments are sometimes scattered in different parts of the country, show that the counties were never laid out as administrative districts. They must have had their origin in some natural circumstances; and as to what that origin was we have no difficulty in making at least a plausible surmise. In point of time their origin is pre-historic. There seems little doubt but that the germs of the present counties existed long before Scotland had any right to be considered as a consolidated nation. Individual modifications there have been within the historic times; counties have been subdivided, others being thrown together, and parts have been taken from one and added to another, but even these modifications have been comparatively few. The first complete list of the Scottish counties known to me—that made more than six centuries ago for Edward the First—scarcely differs from the present division. It is the same with England, where the counties, as given by William of Malmesbury, do not differ materially from what they are now. The germ of the system, therefore, goes back beyond the historic period to the time when the country was still divided among a set of semi-independent tribes. It is of course impossible to trace all the counties back to this stage, but in the case of many of them, among which Fife, Forfar, Kincardine, and Moray may be instanced, there is sufficiently good evidence that the county existed, long previous to its incorporation in the kingdom, as an almost independent earldom or *maor-mordom*, or by whatever other name antiquaries may think best to call it. What is known about these instances may readily be believed to have happened in others. On this theory all the irregularities of size and shape are easily explained. The county consisted of just as much land as the tribe, or colony it may be, which first settled on it could conquer and hold together.

These tribal settlements must have contained within themselves from the earliest times some means of administering justice. What



those were in Scotland the knowledge we have of our country does not enable us to say, but, by putting together what is known here with what is known in other countries of the institutions of the races which settled here, we obtain a view of what ours must have been.

At the opening of the historic period in Scotland four leading races are found in possession. To the south of the Forth the Saxons have possession of the eastern half, and the British of the western; while, to the north of the Forth, the Celts have possession of all not conquered by the Norsemen. You will see that I have discarded the Picts, and I have done so on the ground that there is no evidence that they formed a separate race. These four races—not one of which probably was unmixed—all closely resembled each other. The four fall readily into two groups, the Teutonic and Celtic, and it is customary to assume that there were great and fundamental differences at least between those two races. I do not think the facts bear this out. We have been misled, I think, by two things. All barbarous and most civilized nations are in the habit of greatly exaggerating the differences between themselves; and we are too apt to assume that the difference in the name of an official or institution implies some essential difference in function, whereas the difference may have originated in the merest trifle. We find very considerable diversity of name among the officials in Teutonic and Celtic antiquities, but so far as we can gather very little difference in duty, and the explanation I suggest is that the nominal differences were due to accidental circumstances to which we have now lost the clue. How little difference of name necessarily implies difference of function may be seen from one modern instance. Duke, Marquis, Earl, Viscount and Baron, are all usually supposed by us to mark differences worthy of being kept in mind; but if the antiquary of the future should direct his attention to the matter, he would find that the essential difference lay neither in power, influence, wealth or intellect, but, possibly after much labour, would discover that it lay in the right to walk in a certain rank in processions that were never held, and in the right to wear certain distinctive robes that were never put on.

In all the four races, the tribal constitution seems to have been almost identical, and all recognised the distinction between executive and judicial functions. In the Saxon country two lay officials were supreme—the Earl and the Sheriff. Among the Celts, Chief and Brehon filled analogous offices. Among the Norse and the British a similar division reigned. How the division of duty first arose it is hardly possible to explain, nor do we know with certainty how the appointments to the respective offices were made. It is common to believe that representative institutions existed at some early period among the Saxons while they were still in their German home, and that these representative institutions were superseded afterwards by hereditary. It seems to me, with all

deference to high authorities, that the evidence on which this is believed is insufficient. The Roman writers Cæsar and Tacitus, on whose statements it is mainly founded, could easily have been misled, by their preconceived ideas, and by the difficulty they were under of getting accurate information. It would be against everything that is known of other rude tribes to suppose that the early Saxons had representative institutions, and to suppose that they relapsed to hereditary as they grew more civilized. Certainly, at the dawn of the historic period the Earl was hereditary. The Chief and the Brehon were, so far as we can ascertain, also hereditary. From these I infer that the Sheriff must also have been an hereditary official; and unless he had all along been so, I do not see how his office could have been so quietly accepted in that form for centuries of the historic period. That the office was ever elective there is no evidence. The only doubt is whether the Sheriff may not have been nominated by the Earl; but this, seeing that he claimed almost equal authority, and that he was the principal check on the Earl's abuse of power, I think improbable. In speaking of these offices as hereditary, it must not be understood that I use the word in the strict sense with which we are familiar. Till an office degenerates from a power to a mere dignity, it can never be strictly hereditary. At most the right to it lies in a particular family, the members of which and the governed class settle between them in all sorts of irregular ways the particular holder of the office.

Having traced the offices back to the hereditary stage, we are still a long way from knowing their origin. How the offices—either that of ruler or that of judge—came to be hereditary I do not profess to explain. The race of hereditary judges is almost extinct, while hereditary rulers flourish in abundance, but the origin in either case is lost in obscurity, and is equally difficult of explanation. Palgrave's most ingenious suggestion that the Earl represented the free-man, and the Sheriff the churl among the Saxons, affords a possible clue. The free and the unfree were probably the descendants respectively of a conquering and a conquered race, and the hereditary judges might be the descendants of the chiefs of the latter, retaining the right to advise after the power to order had expired. Another view, however much less probable, would explain the existence of these hereditary judges on the ground of inherited fitness for the office, just in the same way as other hereditary professions and trades arose. To support this view there is the fact that the earliest laws were undoubtedly metrical, and were handed on from father to son, and it is thus possible that not only the possession of the materials, but the power to apply them, might come to be inherited.

The tribal judges were hardly judges in our sense of the word. They were more of the nature of assessors to or sometimes presidents of the Court. The Court must have been composed of

all the free men of the tribe; its president usually was the Earl or Chief. It was only in the absence of the Earl that the Sheriff presided. It is this which explains the misunderstanding embodied in the Latin translations of the names, which made the Earl and Sheriff respectively Comes and Vice-comes. The position of the Brehon as a mere adviser is very plain in the remains of the Celtic laws which we have. So thoroughly was the Sheriff—whatever seat he may have occupied in the Court—a mere adviser, that even in late historic times he was obliged to leave it while the members deliberated. The free men, or, as they were afterwards called, freeholders, decided everything—both fact and law, and were the direct ancestors, in Scotland at least, of the present jurors. Until long within the historic period in Scotland, the Sheriff's Court had the character of a popular assembly: all the freeholders were bound to attend it, all who attended formed the jury, and this jury decided all questions, civil and criminal, of law and of fact. It was apparently through the disuse of the freeholders to attend that the Sheriff came to be in most cases the sole judge.

An uninterrupted continuity cannot be traced between the old tribal courts and the modern Sheriff Courts. Whether in pre-historic times there ever were in Saxon Scotland Sheriffs with the same powers as they had in other Saxon settlements is not clear. It is very possible that on this, their farthest colony, and with its inhabitants much mixed with older races, Saxon institutions did not flourish in their full strength. If they did they must have decayed; and so apparently had the tribal courts in the other parts of the country. Long before the counties became integral parts of the kingdom, the bond which had kept the county together, and had made it capable of acting as one whole, had become weakened. In the earlier charters and collections of law, at the opening of the historic period in Scotland, the county judge is a mere shadow; and it is the courts of the burghs and of the barons which we find as the active administrators of justice. The communities into which the county was subdivided had grown far too strong and too independent, and the power of the Earl and the Earl's Court, or that of the maormor, seems (beyond his own barony) to have existed as a mere tradition. Practically at the opening of the historic period, say in the year 1000, there was no sheriff or other county judge in Scotland. That fact the charters and documents of the eleventh century show pretty distinctly. What we have to explain therefore is how the Sheriff's office was here introduced or revived, and by what influences it was fostered, till it came to be in civil matters the sole county authority in every district.

It is at the opening of the historic period that a new influence comes to bear. When, after the Norman Conquest, England became consolidated under one government, it became a question whether the Scotch tribes were to fall under it, or were, by uniting, to preserve for some centuries more their independence. That

question was fought out. One of the families of the ancient earls became, after endless conflicts with the others, strong enough to enforce its claim to the Crown, and to assert its right to lead the nation. It took more than three centuries before this was accomplished, before the consolidation of Scotland was even in appearance effected and the question of independence settled. To our powerful rival we owed the necessity of uniting, and to the same necessity that of preserving our union. The royal authority became the symbol of union, and in our country there came to work itself out that same problem of centralization which was seething in the Middle Ages in every country in Europe.

The power of the Crown was used, as every one knows, to destroy that of the earls and barons, and to reduce their position to that of powerless dignitaries. The history of how that was done belongs to the region of politics. The only result of it which concerns us was the revival, under a new theory, of the county court. The ancient office of Sheriff became once more of importance. In a mixed nation, the institutions of one of the races must in the end predominate, and with us the Teutonic obtained the lead. If it was right to learn from the enemy, we made no scruple about learning from England. Our Court and our wealthy classes were thoroughly imbued with Norman or Saxon ideas. We copied their institutions wholesale. Our burgh laws, our cathedral charters, nay, what bore to be the very codes of our national laws, we copied verbatim from English sources. Among other institutions, we copied that of Sheriff. At the period of its highest importance the English office of Sheriff was exactly the thing for our kings. The office was at its highest in England at the end of the Saxon period. The Sheriff had then lost the character of a local official, and was known as the King's Sheriff. Probably this had resulted from his having been played off against the earl as being the King's representative within the earldom or county. In Scotland a representative of the King's authority in each district was what was wanted, and the example of England, harmonizing as it did with the old traditions of Scotland, made the Sheriff exactly the official to be introduced. It thus happened that an office, which in its original country was virtually extinguished in the process of centralization, was taken up and fostered in our country. In England, the power of the Sheriffs fell before that of the King's Justices who went their circuits. In Scotland we were a long way from the time when the circuit courts could claim any real power, and the office of Sheriff afforded the readiest means of propagating the royal authority.

The change was made easy by the feudal theory (which came into fashion) of all power flowing from the king, and of the proper evidence for it being a royal charter. Thus earl and thane, *maarmor* and *toshach*, were persuaded, whenever it was possible, to accept grants of sheriffdom, and give up their independence in

return for royal patronage. The local dignitary was thus turned, sometimes sore against his will, into a representative of the central power; and then began a long series of changes by which his local rivals were extinguished, and at the same time his own subjection completed.

The Sheriffs being thus established, the changes by which their courts came at last to be the only local courts having jurisdiction of any extent were not carried out except through a long interval of time. Their courts had three formidable rivals. In the counties they, for long, shared the power with the courts of the regalities. In the burghs they were (till quite recently) eclipsed by the burgh courts. In both town and county they had to yield in certain important matters to the Bishop's diocesan courts.

The Courts of the Regalities were the direct descendants of the ancient courts of the baronies or communities into which the counties had come to be subdivided before the dawn of the historic period. Their jurisdiction, dating of course from the times when central courts did not exist, was, as the name implies, regal, including everything which could fall under the cognizance of a court in early times. Even the four pleas of the Crown were dealt with by the courts of the regalities. The parts of the county which were not regalities were called the royalty. How the germ of the royalty arose it is not difficult to guess. The Sheriff was always one of the barons, and doubtless at first it was nothing but his own hereditary barony. But every means was taken to add to it at the expense of the regality. Whenever the jurisdiction of any barony was forfeited or fell into disuse, the territory accresced to the royalty, and fell under the Sheriff, whose jurisdiction in feudal theory was held to be over the whole county. Various acts prohibited the King from regranting lapsed regalities. Thus, gradually the royalty was increased at the expense of the regalities; but from the thirteenth to the eighteenth centuries, the division of the Scotch counties into royalty and regality was of the most important character.

The relations between the Sheriffs and the Lords of the Regalities were of the most curious character. In theory the Sheriffs had the higher place, but in fact the judges of the regality had more power and jurisdiction. The theories of the courtly lawyers, that the royal Sheriff was the highest local judge, were mere theories. Equally fruitless were some of the attempts of the early legislatures to insist that the King's Sheriff should always be present (something in the character of assessor) in the baron's court to see that justice was done. The acts seem to have remained dead letters, and the barons exercised justice without supervision. The legislature was, in fact, compelled to treat the Sheriffs and the barons as judges of co-ordinate jurisdiction, and there are many statutes which require each to respect the letters of the other, to aid the other in capturing fugitives and in doing justice on offenders. If the Sheriff attempted to do justice on a man subject to a

regality, he was promptly checked by the power to "repledge." Under this the baron's bailie appeared at the Sheriff's Court, claimed the accused, undertook that he should be tried within a certain time, and carried him off to his own Lord. The rise of this system of repledging showed that the powers of the Lords were on the wane, but when the regalities were at last extinguished, they were far from being empty dignities, and still, over nearly all Scotland, exercised an extensive jurisdiction.

It was the necessity for settling the country after the Rebellions of 1715 and 1745, which gave Government strength to extinguish the regality. Along with other less important local jurisdictions, the regalities fell under the Heritable Jurisdictions Act of 1748. Naturally they were not surrendered without a struggle. They were claimed as rights of property, to which indeed they had a close resemblance. In 1745 one was actually held by a woman. The "practical working" of the system was pronounced to be the best possible. Nothing it was agreed could exceed the care with which the barons sought out excellent lawyers and honourable men to sit in their Courts; except perhaps the promptitude and economy with which the Court of Session set them right, if at any time such exemplary courts should err. Some of the arguments used in defence of the hereditary territorial judges were a parody of those used in defence of hereditary legislators at the present day. All, however, was unavailing. Their time was come. Their owners were paid a little money; and the last genuine active relic of feudalism in Scotland was abolished. Henceforth, in the county the Sheriff was in practice, as well as theory, the Judge Ordinary.

Curiously it was not till much later that the Sheriff's authority within the Burghs came to be fully recognised. It is long since the power of the Burgh Courts fell into disuse in the smaller burghs, but in the larger burghs it endured till the present century. In civil matters the Sheriff and the Burgh Courts were courts of concurrent jurisdiction. Unquestionably in very early times the Burgh Courts were the sole courts within burghs, but gradually the Sheriff's claim to an equal jurisdiction came to be ceded, and now the Sheriff is almost the sole judge. The burghs like the barons were beguiled into accepting charters, and then the Law Courts took the charters as the measures of their rights. If the burgh magistrates were not made Sheriffs by the charter, the King's Sheriffs had the jurisdiction; if they had a grant of Sherifdom, the King's Sheriffs were held to have concurrent jurisdiction unless expressly excluded. But from the local institutions being better developed and of a more popular character within burghs, they resisted longer than in the counties. At the beginning of this century it is well known that the Burgh Courts were very active, and that with the aid of assessors, some of whom were lawyers of high repute, they decided pecuniary civil claims of large amounts. Naturally, however, a

concurrent jurisdiction is a state of things which will not last. One or other of the Courts, in course of time, acquires the greater confidence, and concentrates attention. It was so with the Sheriff Courts, and a series of almost accidental oversights completed within a short time what otherwise would have been more gradual. In many of the recent legislative measures, improvements have been made in the Sheriff Courts, while the Burgh Courts were forgotten, and thus the latter, suffering under an antiquated system of procedure, have become inert. In criminal matters something of the same kind has happened, but in the earlier stages of criminal proceedings, and in the punishment of the smaller crimes, the Burgh Magistrates still continue to exercise in some places their old authority.

The Diocesan Courts of the Bishops were exercised through their Commissaries, and had at one time possessed an extensive, though ill-defined jurisdiction. These Courts were hardly at first rivals of the Sheriffs. They came much later into the field, and struck out for themselves a new line. Births, marriages, and deaths have always been occasions for the intervention of the clergy; and of old the clergy did not keep within their own functions, but transacted largely the attendant civil business. Thus the Commissary Courts possessed a widish sphere; and as they had attached to themselves—first of all local courts—respectable bodies of practitioners it had every tendency to increase. The Bishops, as powers of the State, came to an end in 1689, and one would have thought that in a Presbyterian country their Courts would soon have followed, but their Courts existed in full vigour to the beginning of the present century, when at last their jurisdiction was transferred partly to the Court of Session and partly to the Sheriff Courts. Even yet the transference of jurisdiction is in form incomplete. In certain actions the Sheriff assumes the style and title of Commissary, and uses a seal decorated with the episcopal mitre. Truly we lawyers are excellent conservatives.

Thus far of the three other systems of local Courts which were once the rivals of the Courts of the Sheriffs, and of how they fared in the contest. It remains for us to see how the Sheriffs' Courts themselves fared under the direction and control of the central power.

The central or royal power was used towards the Sheriffs in two ways. It favoured them; but it also controlled them. How their Courts were favoured at the cost of the other local Courts we have already seen. Other means by which they were favoured was by the new Acts of Parliament being directed to them. Thus the Sheriffs became often the only judges by whom the statute law could be enforced. But of all the means used by the Crown to foster their jurisdiction, nothing compared at one time in force to the Brieve system, and yet nothing helped the Crown more effectually afterwards when it wanted to withdraw the jurisdiction. The brieves had their origin in the same ideas as the charters. When

in the conflict of jurisdictions in the mediæval times, questions arose as to which Court had the power, a royal message addressed to one Court, and defining the question to be tried, was a ready means of settling the difficulty. Naturally, almost every brieve issued was addressed to the Sheriff. What at first was used to settle a special difficulty, or to clear a doubt, came to be viewed as the ordinary means of commencing a process, and at last as the source of jurisdiction. These brieves were in use in every department of law, but mainly in regard to heritable rights; and they still are used in one or two, though their significance has long been lost.

I come now to consider the means by which the Courts of the Sheriffs were brought more under the control of the central authority.

There are not wanting indications that the first appearance of the royal authority in the County Courts was in the comparatively humble capacity of inspector—to see that the County Courts did justice. The evidence of this earliest step is wanting. So far as I know, we cannot trace the time when the representative of the central power appeared in the County Court in an inferior capacity; but we have numerous examples of inferior courts in which he could not appear at all, and at least one example (in a people of the same stock as ourselves) of his appearing on terms of equality with the local judge. From these we may infer that the intermediate stage existed. If we thus bridge over the interval between the national and the tribal court, it explains some things not otherwise intelligible. The old court of the Justiciar was exactly the Court of the Sheriff, and, except the act of presiding, the Sheriff did all that was to be done. It explains the almost superstitious importance which the old laws attach to the presence of the Sheriff at the circuit. Over and over again, the old statutes threaten him with all sorts of penalties should he fail to attend the Court, and as some of us know, this superstition has hardly yet died out. In whatever manner, however, the origin may be explained, the right of the King to intervene in the County Courts came at last to be fully acknowledged, and it was in partial operation at the opening of the historic period. The theory, as an old Act quaintly expresses it, was that "the King ride through the realm for the punishing of crimes," and in practice the Royal Justiciars or Justice-Clerks made circuits administering justice, in the Sheriff Courts, in the King's name. In time these circuits came to be held regularly twice in the year, once on the grass and once upon the corn. These formed the germ of the present Court of Justiciary. In due time the national power became sufficiently concentrated to enable it to develop a supreme central court exercising both civil and criminal jurisdiction.

The ultimate effect of the firm establishment of the Central Court on the local courts was two-fold. It made a large inroad on their jurisdiction, and it subjected their sentences to review. I shall begin by noticing its effect, in both those respects, in criminal matters.



The Justiciars claimed a cumulative jurisdiction in all criminal matters. The right of the King to judge any matter at his pleasure "as it was wont to be" was asserted, and the Justiciars judged in every matter, from the burning of green wood and salmon-poaching to the four pleas of the Crown. The next step was to assert a privative jurisdiction in certain more important matters. That the four pleas of the Crown were once competent within the Sheriff's Court, I think may be held as proved. Almost to the end, they were competent within the courts of the regalities. Among the directions to the Chamberlayne, who made tours of inspection round the burghs, was one to see that the Burgh Courts did not meddle with the four pleas. In the oldest charters, granted to earls, the four pleas are specially reserved, and "when bid by the Justiciar" the Sheriff still could try the four pleas. Lastly, in one or two instances, the most important of the four pleas, murder, was till comparatively a late period competent in the Sheriff Court without any special authority. Why we do not find more positive evidence of the competency of the four pleas is easily explained. The Sheriff Courts, having, out of all the local Courts, been taken as it were under the royal patronage, would naturally be the earliest to obey the royal wishes.

With the exception of losing the power to try the four pleas, the Sheriff Courts suffered no other loss of power in criminal matters till comparatively recently. So long as capital punishment was indiscriminately awarded, the Sheriffs retained the power of inflicting it. Till within the last century, sentences of hanging and drowning were common. Other forms of corporal punishment were frequent. Flogging, for which the public appears to have revived its affection, was a very common punishment. A common sentence also was that of banishment—of course only from the shire, which was the limit of the Sheriff's power. The Royal Courts only had the power of banishing from the realm, and thus it has come that they alone possess the power of awarding the punishment of penal servitude, which has come in its place.

The rights of the Supreme Court to review the decisions of the Sheriffs' Courts has in criminal matters been only partially established. Simple as our notion of an appeal from a lower to a higher Court appears, it was only developed after intermediate stages. The first crude idea of an appeal does not touch the sentence. It is an appeal to the King to punish or censure the unjust judge. In the second stage, there is a petition simply to set aside the sentence; and in the earlier forms of this stage, it is generally found combined with the first. It is not till the third and last stage is reached, that the Supreme Court is asked to take up the matter, and to pronounce the sentence between the parties which the justice of the case requires. In Scotland we have not in criminal matters advanced beyond the second stage, and even retain reminiscences of the first. In some appeals in criminal matters, the Sheriff is still cited to

appear before the higher Court, and at each circuit he still "tholes an assize" for all the iniquities he has committed. But these reminiscences of the first stage are harmless. It is, however, not so harmless, that we are still only in the rude second stage, and that the Supreme Court, in reviewing criminal sentences, exercises no other power than that of simply affirming, or simply reversing. The power of review errs by defect and by excess. Sometimes the unjust sentence cannot be touched, and sometimes a trifling mistake can be remedied only by allowing a serious crime to go unpunished.

I come now to consider the effect which the establishment of the Supreme Court had on the civil jurisdiction of the Sheriff Court. Notwithstanding various attempts by the legislature to secure that certain actions should, as "of old," be pursued before the Judge Ordinary, the central Court soon succeeded in establishing a co-ordinate jurisdiction in nearly everything which was competent to the Sheriff. The next step was to secure a privative jurisdiction in certain more important matters. The success in regard to heritable rights was complete. It was facilitated by various circumstances. The Sheriff's heritable jurisdiction was probably at the time of the institution of the central Court a matter of very little practical importance. Questions of heritable right at that time would arise between barons as powerful as himself, and his decree might have little value. As matter of fact, such cases were usually settled by the king and his council, or parliament. The Sheriff's heritable jurisdiction must of old have lain in settling questions between the smaller proprietors, in settling questions of boundary, allocating lands to widows for their terce, and other matters possibly of no great moment; but that he had such a jurisdiction, in theory concurrent with that of the Supreme Court, I think admits of no doubt. Much of it was exercised under the brieve system, which contained within itself the power of withdrawal. What of heritable jurisdiction remained after this power was exercised was finally disposed of by the process of "advocation," by which the Supreme Court, on the plea of the importance of the matter at issue, removed the suit to their own Court. The last step of all was for the Supreme Court to assert as a constitutional maxim, that it was entirely incompetent for the Sheriff to deal with the subject, and thereupon to quash any proceeding in which he should attempt it. This completed the most serious inroad on the Sheriff's civil jurisdiction. The most of the other matters, in which the Court of Session had privative jurisdiction, were new matters, arising under new statutes, which conferred, or at least were held to confer, the power on it alone.

The right of the Court of Session to a cumulative jurisdiction in all cases has at various times been subjected by the legislature to restraint. "To prevent the time of the judges from being wasted in small matters," actions under 200 merks Scots were declared incompetent to them. This limit was raised to £12, and ultimately

to £25. In actions below the value of £25 the legislature has made the decision of the Sheriff Courts final. This legislative provision has, however, scarcely received fair play at the hands of the Supreme Court, for it is still held competent to have any amount of litigation over a very small value, if only it arise as the balance of a larger, or be embodied in some specific article.

The right of review by the Court of Session in civil matters is far more complete than the corresponding review of the Justiciary Court in criminal matters. It is true that it is only a very few years since the idea of a simple appeal from the one court to the other was carried into practice. But the process of "advocation," cumbrous as it was, was worked so as to attain the same end. In general, its use so as to elude the Sheriff's jurisdiction was discouraged, actions not being appealed till they were decided; and the ultimate sentence pronounced was not limited to an affirmance or reversal of the inferior sentence, but was an endeavour to meet the justice of the case. In coming to a final decision, the Court moreover was not hampered by any inclination to accept the Sheriff's view as final upon any matter of law, fact, or discretion. Unfortunately this process of advocating, such as it was, was not held competent in all circumstances; and among other inconveniences it has resulted that the right of appeal, which was substituted for it in 1868, has only a limited application. If the process in the inferior Court had been brought to an end by judgment having been issued, advocation was, and appeal still is, in general, incompetent. In such circumstances, the remedy is the process of suspension or reduction, where the action commences almost of new, and the powers of the appellate Court are of the crudest. These inconveniences, the remains of a system when the two Courts were independent, may be hoped soon to disappear. Another curious limitation of the power of the Court of Session over the inferior Courts, arising from the same cause, is to be found in the fact that they rarely call in their assistance. Although frequently annoyed with trifling actions, the supreme judges never venture to remit causes to the inferior Court. Perhaps some day they may do it. There have not been wanting preliminary indications of an assertion of the right, or at least of something very analogous to it. They have with the usual appeal to "inherent power," which is common when written law and usage fail, asserted their right to order the Sheriffs' assistance in the conduct of causes, and to require them to make investigations and reports for their use. Doubtless some day the whole right will be exercised. If it be done on the mere authority of the Court, it will be thought for the moment, and indeed it will be, a stretch of power, but it will be cheerfully acquiesced in; and the astonishment will be in a short time that it never was done before.

The history of the relations between the two Courts is thus one of a continued increase in intimacy and closeness, and some day at

last they will stand to each other as courts of higher and lower instance, with their relative powers and jurisdictions as sharply defined as if they were to be found in a code framed with the wonderful foresight of continental jurists.

Let me pause for a moment to see how far I have brought the argument. I have shown the probable origin of the Sheriff Courts; how they were enabled to extinguish their rival Local Courts; how their jurisdiction was curtailed by the Supreme Court; and how their decisions were subjected to its review. The changes I have connected with the slow carrying to completion of the great change, begun centuries ago, from tribal to national government. They seem to me to have been all due, directly or indirectly, to the increase of strength in the central power. It remains to me to show how the State acquired the entire control of the machinery by which the Sheriff Courts are worked.

Although, from very early times, the Sheriff was regarded as the representative within the county of the national authority, the relations between him and the Crown were for long of a very independent character. When the office was introduced, or revived in Scotland, the theory was that he was the King's Sheriff, and in our earlier laws he repeatedly obtains that title. As such he in fact collected the Crown revenue, published the new statutes, and kept the king's peace. As such also the Crown asserted over him the right to appoint to and to remove from the office. But this power the Crown was for centuries too weak to enforce. At the very beginning the office is found in the possession of families as a matter of hereditary right. Public opinion occasionally sanctioned the crown in superseding the hereditary Sheriff for a particular duty in which he had failed, by appointing a special Sheriff for the purpose. In graver cases it sanctioned his suspension for a period. For gross misconduct the Crown could exercise the power of forfeiting the office. But in those days the Crown always dealt with the Sheriff as with a person possessing independent rights, and centuries elapsed before the State could venture to treat the office as one to be gained and held by its servants as a matter of personal merit. It was only when the State had acquired considerable strength, and after circumstances had arisen, showing strongly the necessity for exerting it, that it could obtain the thorough control of the appointment to the office of Sheriff. After the first Jacobite rebellion, the first serious inroad on the hereditary Sheriffdoms was made; and after the second they, in common with all the other hereditary jurisdictions, came to an end.

For long prior to 1748, there had been a division in the duties of the office, by which the non-legal part was exercised by the Sheriff himself, and the judicial part by a depute whom he appointed. The effect of this was to make two offices in the county. One, which for convenience may be called that of High Sheriff, was analogous to the English office of that name, or to that

of Lord Lieutenant; but its possessor had also the patronage of the other office of Sheriff-Depute or County Court Judge, and originally the power of selecting and dismissing him at pleasure. The separation between the offices was a concession to public opinion, and was one of many similar devices by which the owners of the hereditary jurisdictions endeavoured to make them keep pace with the times. In England the *Lord* of the *Manor* was in certain circumstances bound to employ a qualified assistant in his Court. In Scotland a control over the appointment of the depute began to be exercised over the Sheriffs so far back as the time of James VI., and perhaps earlier. In James's time there is an Act which requires the Sheriffs to submit the names of their deputies to the Court of Session annually for approval. How far this Act was carried out I do not know, but as we all know the power which begins by exercising a *veto* ends sooner or later in getting the patronage. The result of the Jacobite rebellions was, that the separation between the office of High Sheriff and Sheriff Depute which had so long existed as matter of fact, became matter of law. Along with the other hereditary jurisdictions, the judicial powers of the High Sheriffs were declared to be forfeited. These were then declared to belong to the Sheriff's Depute, and the powers of appointing the latter was handed over to the Crown. At the same time, what had long been customary was made absolutely necessary, and it was required that the depute should possess a legal education—the qualification fixed on being that of an advocate of three years' standing. Thus at last the Crown gained the power of appointing the judges of the Sheriff Courts.

The subsequent changes in the history of the office of Sheriff have little historic value. The office of high Sheriff was made an annual office, or one to be held during the King's pleasure, and it was conferred on one of the class to which the hereditary Sheriffs belonged. The title is still sometimes conferred, but as the duties left in the office were ill defined, and their performance optional, the appointment has, as was doubtless foreseen, become an empty dignity. Its holders are not even troubled to exercise the munificent hospitality which is the privilege of their English brethren. The entire interest in the office of Sheriff after the Act of 1748 centres for a while in the Sheriff-depute; but the parsimonious footing on which that office was established made it unequal to the position. The deputies in the time of the hereditary Sheriffs had (naturally) no salary, but were paid, in so far as they were paid at all, by fees which they exacted. This resource was insufficient for a high class of professional judges, but the Government, in place of giving such salaries as would secure the entire services of adequate men, provided only for the services of the deputies for a few months in each year. They were therefore paid small salaries, and were allowed to continue their practice at the bar. The effect of this of course was that they seldom or never resided in the

county at all. The advocates who held the appointment came if there were suits to decide, but otherwise they remained in Edinburgh and attended to their practice. It was this fact which first brought into prominence the office of Sheriff-Substitute. This office had existed from very early, as a means of supplying the temporary absence of the depute, and in 1748 the depute had had transferred to him the power of appointing the substitute. At first the substitute received no pay, and did no stated part of the work. He had also no legal qualification. But the protracted absences of the depute threw more and more of the duty on him. By and by it came to be considered decent that the depute should allow him a salary; and then (towards the close of the last century) the depute succeeded in shifting the burden of paying it on the Crown; and last of all (in the beginning of the present century), he succeeded in throwing almost the whole burden of the work on the substitute. Side by side with these changes came another change, by which the depute came to be a judge of appeal from the substitute, in the more important proceedings. The rise of the substitute into importance has been rapid. In 1784 he first received remuneration from the State and became its servant. By and by it was made essential that he should be either an advocate or a law agent of three years' standing. In 1838 he acquired, in almost all respects, the position of a judge. The State then took him entirely into its pay, debarring him from following any other occupation, and giving him the right to hold his office during good conduct.

In the earliest times, there was of course no Sheriff Clerk. We have so become accustomed to a record of the proceedings being kept, that it strikes us as a novelty to find that down even to the end of the last century much justice was administered verbally, with no record whatever. What happened till then in small causes was originally the rule. It was at first only in the most important cases that the Sheriff employed some one, usually a notary public, to reduce the proceedings to writing. By and by a regular clerk became necessary, and the Sheriff appointed him. The first interference of Government was in the shape of a provision that the name of the clerk should be submitted to and approved of by the Court of Session. The last stage was for the Crown to assume the patronage and regulate the office. The Procurator Fiscal was originally a person appointed by the Sheriff to assist him in the duty of collecting the King's revenue. The function of the office has gradually but entirely changed. The least part of the duty is now concerned with the revenue, while the Procurator Fiscal is now mainly occupied with the duty of prosecutor, which the parties injured originally performed. The law agents were originally admitted by each Sheriff according to his own discretion. For long practitioners were scarce, and each Sheriff thought himself lucky if he could attach a few respectable persons to his Court. But in almost every case the agents in one sheriffdom were treated

in the next as if they belonged to a separate kingdom. To reduce this state of confusion the central authority so far exerted itself as to make common rules for the admission of agents all over Scotland. This stage lasted about half a century, and then the last came, by which the agents were treated as if they also belonged to a national system, and there became one set of law agents for all Scotland.

I have now done with my proper task. The authority of the State, for long a mere name and theory, has at last become a living reality. Its active interference is now a thing so familiar, and we have been so long accustomed to look to it for the regulation of even the minutest details, that it is only with an effort that we can realize that it did not all along exist. Whither under its guidance are we now tending? This question, most will think, will be determined on practical considerations, but as the understanding of the past is necessary for that of the present, so I think past progress may throw some light on the future. I devote my few concluding remarks to considering in which direction the lines on which we have been working will lead us.

As regards the staff of the Courts, I think the direction is firstly towards the clearer separation of the duties to be performed by the various officials, and especially to the separation of the duties of Judge Ordinary from those of Judge of Appeal. Practically this separation is complete, the occasions on which the duties are still confounded being few and unimportant, and I anticipate that in a few years people will scarcely even remember that there was a time when the Judge Ordinary was liable to be superseded by the Judge of Appeal.

In the second place, I anticipate a considerable strengthening of the position both of the Judge Ordinary and the Judge of Appeal. I doubt if the theory ever took shape, but there was a latent idea, not altogether exploded in some regions, that, provided you had a good Judge of Appeal, of easy access, it was of no manner of consequence what sort of Judge Ordinary you had. It was a most mischievous idea. On the way in which the duties of Judge Ordinary are done depends, in great measure, the time which a litigation will last, the cost at which it will be conducted, and the clearness with which the points at issue will be brought out. To suppose that you can keep the Judge Ordinary right by having a Judge of Appeal always at his elbow is mere childishness. At the best, that always implies doing the work twice over, once wrongly, and then rightly. In this country the great importance of having a good Judge Ordinary is fully recognised in the Supreme Court, where the Judges Ordinary are selected from precisely the same men as are the Judges of Appeal. I expect the same necessity will be more fully recognised in the inferior Courts. The late Law Commission recognised it in two forms, in the necessity of giving higher remuneration, and in most

instances, of giving him more employment. Of the former I say nothing here, but the latter is important. Why we should now rigidly adhere to the ancient county divisions, which may have been well enough a thousand years ago, for the territorial districts of our local jurisdictions, I can conceive no reasons, except fanciful ones. It is surely time now to re-arrange the districts, with a view to the best and most convenient mode of conducting the business. I apprehend that everything shows that the Crown must soon assume the responsibility of naming the Judge Ordinary. And I think it follows from what I have said, that the arrangements for the hearing of appeals in the Sheriff Court will be strengthened. But I have no wish to enter now on topics which will lead to controversy.

In regard to the jurisdiction of the Courts, I think everything shows that it must be greatly extended in width, so that there may be no question—or almost no question—which parties who afford to go to higher Courts may not have determined, in the first instance at least, in the lower Courts. It is also to be expected that from time to time additions may be made to our jurisdiction by transferring to us duties at present discharged by the other inferior Courts. Perhaps this extension may be accompanied by a limitation; and it may be found to have advantages to give to the Supreme Court a privative jurisdiction in those cases involving high pecuniary amounts, of which it has at present practically the monopoly.

In the end it is possible that we may reach the simplicity with which it used to be thought we had started. It has not been found beyond the power of foreign governments, or the ability of foreign jurists, to draw up codes, in which the jurisdictions of all the Courts, and their modes of proceeding, were set out in clearness and order. There is no reason creditable to our government, or to our profession, why we have not now a code of procedure. The waste of money alone, which occurs on account of ignorance of the proper Court or of the proper form of proceeding for ascertaining a right, is in this country an intolerable abuse; and, in the present state of the law, it is impossible for the most careful judge or the most prudent practitioner to avoid it. We grope in the dark for what ought to be as clear as day. I am under the mark when I say that it requires a Scotch lawyer to read not less than a hundred statutes, or less than a thousand decisions, before he can be said to have covered the field of Scotch law procedure. And it would be well if he could say that in the end he had found everything distinct. It is far from being so. The statutes and the decisions are alike fragmentary and confusing, giving the idea that nobody had ever had time in our busy country to do more than provide in some way for the difficulty of the moment. How often, in the future, must justice miscarry,—that is, how many more suitors must be wronged,—before the remedy comes? Even the small instalment of im-



provement, which would be given by the easily effected step of carrying a consolidation statute to clear the statute books, would be of inestimable advantage—perhaps not so much for what it would do, as for the distinctness with which we should then see that the greater work of codification was not beyond our capacity.

### THE ROMAN CATHOLIC BURIAL CASE IN THE PRIVY COUNCIL.

THIS case has obtained some celebrity, and not more than it deserves. But the points of interest in the Privy Council judgment, now that we have the opportunity of examining it accurately,<sup>1</sup> are not quite those which popular criticism had fixed upon.

1. The general impression was, that in this case the Privy Council had issued a *mandamus* to the Roman Catholic authorities in Montreal, enjoining them (after they had refused to do it) to bury an excommunicated man with religious rites, or in consecrated ground. And there was good ground for this supposition in the original form of the petition. It was presented by the widow of Joseph Guibord, a Montreal Roman Catholic, against the Curé and "Marguilliers" of the Church of Notre Dame there, functionaries who together constitute a corporation called "La Fabrique de Montréal," which manages the temporalities of that church, and has the control of its cemetery. And the petition ran, that the defendants might be commanded "to bury, or cause to be buried, the body of the deceased Joseph Guibord, in the Roman Catholic cemetery, conform to usage and to law." The meaning of this last rather vague prayer is explained by the facts of the case. The Montreal Roman Catholic cemetery has a part separated from the rest by a paling, in which are buried unbaptized infants, suicides, and those who have died "*sans les secours ou les sacrements de l'Eglise*." Guibord had belonged to a Montreal Literary Institute, which persisted in keeping books condemned by the Index Expurgatorius; and for this offence alone he and some others were denounced by the Bishop, who finally ordered his clergy to refuse them the sacraments. On his death, the Curé refused to bury him in the ordinary part of the cemetery, but offered to allow him interment in the separate part already mentioned, without the performance of any religious rites. Neither part of the cemetery is consecrated, but "it is the custom to consecrate separately each grave in the larger part" only. On this state of facts the prayer above mentioned was objected to by the defendants as bad for un-

<sup>1</sup> Privy Council Appeal, *Brown v. Les Curé et Marguilliers d l'Œuvre et Fabrique de Notre Dame de Montréal*, Weekly Reporter, vol. xxiii. 184.

certainly, "inasmuch as it does not specify whether civil or ecclesiastical burial is meant," and the Court of Queen's Bench in Canada sustained the objection. The Privy Council judgment overruled this in the first place, holding that they had power, even under the vague prayer of this petition, to issue a peremptory writ, "specifying distinctly *what* they considered the defenders are bound to do according to usage and to law." This unsatisfactory form of procedure can hardly be said to have been justified by the result. All through the discussion their Lordships (Lord Selborne, Sir James W. Colville, Sir Robert Phillimore, Sir Barnes Peacock, Sir Montague Smith, and Sir R. P. Collier) seem to have dealt vaguely with the right to be buried in the larger or respectable part of the cemetery as a "right of ecclesiastical burial." They are "disposed to concur" in the view that questions of baptism, marriage, and burial (ecclesiastical) are "mixed questions," in which the Court has a certain jurisdiction. But they make no attempt whatever to distinguish or extricate what they propose to do till the last paragraph, where the judgment (pronounced by Sir Robert Phillimore) suddenly says,—

"Their Lordships do not think it necessary to consider whether, if the parties and circumstances of the suit had been different, they would, or would not, have had power to order the interment of Guibord to be accompanied by the usual religious rites, because the widow finally forewent this demand, and counsel at their Lordships' bar have not asked for it, and also because the Curé is not before them in his individual capacity"—their Lordships having previously decided that he was called merely as a corporate holder of land, not as a priest or spiritual person. And for these reasons they issue a writ commanding the said corporation "to prepare, or *permit to be prepared*, a grave in that part of the cemetery in which the remains of Roman Catholics who receive ecclesiastical burial are usually interred," and to bury there, "or *permit to be buried there*," the remains of Joseph Guibord.

Thus, by a process which is described as "moulding the order for a peremptory writ," the Privy Council silently avoids the chief difficulty which the original prayer for an order "to bury, or cause to bury," "conform to usage," had certainly raised. They add a very proper but rather feeble "hope, that the question of burial, *with* such ceremonies, will be reconsidered by the Church authorities, and further litigation avoided," but they give the whole expenses of the present case against the defendants. The result is such as not to make us regret that the phrase "a mixed temporal and spiritual matter" has obtained no place in Scotch law. With us, mere burial in a particular place, however sacred in sentiment or religion, would be held a purely temporal matter: our law in this following the Presbyterian and general Protestant idea of the North of Europe. The strongest advocates of the Kirk's freedom in Scotland hold, that the civil courts are not only entitled, but

bound, to decide the question of mere interment in any particular place on being applied to by any one having interest, and to enforce their decision; while they would certainly also maintain the right of Roman Catholic and Episcopalian clergymen to be free from the orders of any civil court to perform at such interment the offices of their Church. And the precedents of our law make it nearly certain that no such order as this last could in Scotland be attempted.

Still, the absence in such a matter of any question of jurisdiction in Scotland, and the evading of it in England, may leave another matter of great importance on the merits. The right (not of ecclesiastical burial, but) of burial in consecrated or ecclesiastical ground, is one fitted to excite the intensest personal and religious feelings. And the determination whether that right exists in a particular case may involve, as in this case it did, world-wide questions, in themselves of a purely ecclesiastical kind, though necessary to be considered by the civil court with a view to the civil result.

2. For the question which the Privy Council found to lie between them and the decision of this case was nothing less than the great European problem of Ultramontanism and Old Catholicism in the Roman Catholic Church.

They first set aside another interesting ground on which their judgment had been claimed. The Roman Catholic Church of Lower Canada was the established Church of that province before its cession to England by France, in 1762, and though since then "it has undoubtedly wanted some of the characteristics of an established Church," they state that it differs from voluntary religious societies by retaining its endowments and having certain payments to the clergy from the people secured by statute and by law. "These rights of the Church must beget corresponding obligations," and one of the grounds on which the appellants put their application was, that it was an *appellatio tanquam ab abusu*—the old "appel comme d'abus"—which was competent in French ecclesiastical cases to the Parliament of Paris, and in Canada, it was argued, to the Superior Council. Of the competency of this remedy in the civil courts of Canada their Lordships expressed great doubts; but they waived the question altogether on the ground that such a process must be different in form from the present, and must have for defendants the "proper ecclesiastical authorities."

The Roman Catholic Church of Lower Canada, accordingly, they consider in this case as a "private and voluntary religious society, resting only on a consensual basis;" and they quote as the principle of their judgment the well-known sentence about the Church of England in Capetown—that such a Church will be bound by the rules it adopts, and also by the regular and honest decisions of any tribunal of its own appointed to determine whether these rules have been violated. But when due complaint is made against such a determination to a civil court, that court is

bound "to inquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury." Accordingly, they proceed to inquire whether by the rules of the Church Guibord was excommunicated, or had otherwise forfeited his right to ecclesiastical burial. And they seem rather to admit, that if the decrees of the Council of Trent and the rules of the Congregation of the Index (a decretum of which specially condemning the Institute, of which Guibord continued to the last a member, had been published long before his death) are valid in Canada, he may have been held to come under the category of "pêcheur public," and so to have forfeited ecclesiastical sepulture. But they hold that it has not been proved that these bind the Canadian Church. It was before the Cession a branch of the French Church, and the French Church, then holding the Gallican Liberties, received only partially the decrees of Trent, and still less accepted the Holy Office and the Congregation of the Index. And "no evidence has been produced to their Lordships to establish the very grave proposition that Her Majesty's Roman Catholic subjects in Lower Canada have consented, since the Cession, to be bound by such a rule as it is now sought to enforce." There is, they intimate, a possible further question, whether, in view of certain English statutes, it would be *legal* for them to adopt such a rule. But they waive this, and go on the negative ground, that it "has not been shown to their Lordships" that it has been done. Not a word is said about the recent Œcumenical Council, at which all or almost all the French and Canadian bishops not only affirmed Trent, but accepted the higher positions of Ultramontaniam; and considering that the Gallican Liberties do not seem to have been proved to their Lordships, but are accepted by them as notorious and public history, this ignoring of the equally celebrated recent developments looks a little one-sided. But at all events the general drift of the judgment is clear. It goes almost to this, that in every country where Old Catholicism or Gallicanism may be supposed to have once ruled, the Courts of England will presume it to be still the law of the Roman Catholic Church, *unless and until the contrary is proved*. And there seems little doubt that a similar case which might be raised in England by any of the recalcitrant noblemen and gentlemen of that Church whose names have been recently before the public, would be dealt with on the same principles.

Accordingly, the last point of legal general interest is the following. The principle of *Long v. Capetown*, reaffirmed here, makes the important point for defenders in such a case to be, to show that an ecclesiastical tribunal has been constituted to deal with the point in question, and, *inter alia*, that it has dealt with it. But in the present case—

"In the Courts below, it was ruled, apparently at the instance of the respondents (Curé, etc.), that the law, including the ritual of the church, could not be proved by witnesses, but that the courts

were bound to take judicial notice of its provisions. The application of this ruling would be difficult, unless it be conceded that the ecclesiastical law which now governs Roman Catholics in Lower Canada is identical with that which governs the French province of Quebec. If modifications of that law have been introduced since the Cession, they have not been introduced by any legislative authority. They must have been the subject of something tantamount to a consensual contract binding the members of that religious community, *and as such, ought, if invoked in a civil court, to be regularly proved.*"

This completes the unsatisfactoriness of the judgment we are considering, so far as it can be criticised from the standpoint of another jurisprudence. The decision come to by the Court below on its own knowledge, without proof, of the present law of the Roman Catholic Church, has been reversed by the Privy Council on its own knowledge, also seemingly without proof, of the law of that Church two centuries ago, without any proposal to supplement the blank of evidence. But apart from the particular case, the general rule here repeated as to the burden of proof appears to be well fixed. It might have been deduced in English law even from the old case of *Lady Hewley's Charities*. And it seems to be the law in Scotland as certainly as in England.

On the whole, then, this case postpones rather than decides the great European questions. But it suggests four interesting conclusions. 1. That there are certain questions, such as that of sepulture, which on the Roman Catholic theory are mainly or wholly ecclesiastical, but which on the theory of our law are purely civil, and must be decided finally by civil law, however keen be the feelings involved. 2. That the law of England, which acknowledges "mixed questions," is willing, instead of extending itself systematically over both sides of them like the new law of Germany, to make incredible exertions to avoid touching the side of internal church action (in this case deciding "sepulture" and avoiding "ecclesiastical rite"). 3. That in order to decide the civil question (*e.g.* sepulture), the civil court may have necessarily to traverse the ecclesiastical region, and to decide, for its own purposes, the most exalted questions of Church history; and 4. That in this view litigants will do well not to throw upon the Court the function of creating its own historical materials.

A. T. I.

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#### REMARKS ON RECENT ENGLISH CASES.

*Ambiguities in Wills—Admissibility of Extrinsic Evidence.*—The case of *Charter v. Charter*, 43 Law Journal Reports, P. & M. 75, decided by the House of Lords on appeal from the Court of Probate, is interesting, curious, and instructive, as illustrating the prin-

ciples that are applied in the interpretation of uncertain or ambiguous expressions in wills, the subtle and refined distinctions that are drawn in determining whether evidence, and what evidence, *dehors* of the deed, is admissible, the minute circumstances which, when such evidence is allowed, are taken into account in determining the meaning of the expressions used, and the extreme difficulty of arriving at a result which one can say with assurance is the true one. When a testator, wishing to leave his property to one of his two sons, does not express the name of either, it is not surprising that out of four Law Lords who are called upon to determine his meaning two of them should think that one of the sons was meant and two should think it was the other. Such a case as this brings into startling contrast the crassness of some human minds and the ingenuity of others. The case was this. The testator Forster Charter made a will nominating his son "*Forster Charter*" executor, and bequeathing to him all his property, subject to certain legacies and a certain annual charge. The will was drawn by a lawyer, but the testator had the benefit of clergy. The document was drawn by the vicar of the parish, and executed in his presence in a public-house. The testator lived for ten years after, but made no change in the will. The testator had had a son of the name of Forster Charter, who, however, had died long before the date of the will. At that date there was no son of the name of Forster Charter, but there were two, and only two sons, one called William Forster Charter and the other Charles Charter. Here was a case of latent ambiguity, and, according to Lord Bacon's rule, evidence extrinsic of the deed was admissible to show which of these sons was entitled to succeed. The Judge of the Probate Court allowed direct evidence of the intention, including parole evidence of the declarations of the testator. The House of Lords unanimously reversed, holding that the case did not present the kind of ambiguity in which such evidence is admissible, viz., as it is expressed in the seventh proposition in Sir James Wigram's Book on Wills, where the person or thing is described in terms which are applicable indifferently to more than one person or thing. It was rather a case where the description was *inapplicable* to either, and therefore fell under Wigram's fifth proposition; in which case the Court may inquire into every material fact relative to the person claiming or the property claimed, and the circumstances of the testator, his family and affairs, for the purpose of identifying the person or thing intended, but cannot go into intention. To the former class belong such cases as *Reynolds v. Whelan*, 16 L. J. Ch. 434, where the testator gave a legacy to "William Reynolds, one of my farming men," and there were two of his farming men of that name. From the evidence it appeared that William Forster Charter had never been called "Forster" in the family, but had always been called "Willie." The will directed the executor to pay the testator's widow £10 a year, and allow her ordinary maintenance "so long as

they reside together in the same house;" or, if "they think proper to live separately," to give her a certain cottage for residence, and supply her gratis with a reasonable quantity of provisions. William Forster Charter was married, had a business of his own, and had lived for many years 100 miles away from his father. Charles Forster lived with his father and mother, working on the farm. Lords Cairns and Selborne gave their opinion in favour of Charles. "Forster" certainly did not designate the younger brother Charles, but it was not the first or leading name of the elder brother, or that by which he was ever spoken of by the testator. There was thus clearly a mistake, and it was therefore necessary to look at what other demonstration of the executor was to be found in the will. If there had been nothing else than the name "Forster Charter," possibly the eldest son might have prevailed, seeing that the name Forster formed part of his name, but no part of the younger son's. Their Lordships founded on the clause in the will, "so long as they reside," and "if they think proper to live separately." These expressions obviously pointed to a person who was at the time of making the will living with his mother, and who had it in his power to continue living with her; a description applicable to Charles, but not to William. The conclusion was, that the description, which applied perfectly to Charles, and not at all to William, prevailed over the name which, if you regard the actual or baptismal name of the elder brother, and not his familiar name, applied to the one more than to the other, but was not truly applicable to either. Lord Selborne remarked, that the moment we find that there is really error in the name, the consideration that we are always bound to assume that the language of the will is the language of the testator ceases to be material. It is then part of the case that a slip has been made, and it can make no difference whether the slip was the testator's own or that of the writer of the will. Lords Chelmsford and Hatherley were of a different opinion. The words "so long as they live together," they did not interpret as meaning "so long as they continue to live together;" and even if the words had had this meaning, they doubted whether they referred to Charles with sufficient certainty. The learned lords were unable to get over the fact that Forster Charter was a designation, perhaps not complete, but at least sufficient, of William Forster Charter, while it was no designation at all of Charles Charter. Lord Chelmsford, indeed, doubted whether, without the evidence which had been improperly admitted, there was any ground for alleging that there was any latent ambiguity whatever. The House being equally divided, the judgment of the Court below was allowed to stand. The result is rather amusing, seeing that the judgment of Lord Penzance was based on evidence part of which, and that the strongest which was produced in favour of Charles, the House of Lords unanimously held had been wrongly admitted. So that Charles Charter

appears to have been preferred to an estate bequeathed to Forster Charter, because Lord Penzance gave a judgment in his favour which was reversed.

It is remarkable that in most of the cases of this class the description of the legatee has prevailed over the baptismal name. In the case of *Keiller v. Thomson's Trustees*, where the legacy was to William Keiller, confectioner in Dundee, James Keiller, confectioner in Dundee, was preferred to William Keiller, confectioner in Montrose. So too in many English cases, such as *Beaumont v. Fell*, 2 P. Wms. 140, where a legacy to "Catherine Earnley" was successfully claimed by Gertrude Yardley; *Still v. Hoste*, 6 Madd. 192, where a bequest to Sophia Still was obtained by Selina Still; and *O'Reilly* (43 L. J. Rep., P. & M. 5), where "*Georgina Geraldine de Bellin*" was designated as executrix, and the appointment was given to *Adelaide Geraldine de Bellin*, not to *Georgina Geraldine Kate de Bellin*. A number of cases of this description are detailed by Lord Hatherley in *Bernasconi v. Atkinson*, 23 L. J. Ch. 184.

The distinction between the case where the description is equally applicable to two persons or things, and the case in which it is not applicable to either of two persons or things, is fine enough, at least when there is founded on it such a great difference in the mode of proof. Why the law should reject evidence of intention in cases where an error in description involving a latent ambiguity has to be corrected, while evidence of the same kind is admitted in what Lord Bacon describes as cases of equivocation, Lord Selborne confessed he did not clearly understand; but it had been so settled by a series of authorities to which he was bound to adhere. The cases which settled the doctrines in question are *Gord v. Needs* on the one hand, and *Miller v. Travers* and *Hiscock v. Hiscock* on the other. One cannot help thinking that a testator's words are just as vacant of meaning when they do not apply with certainty to anything as they are when they apply to more than one thing, and consequently that there is as good a reason for having recourse to direct proof of intention in the one case as in the other. A description which applies to many things is just as vague as one which does not apply with certainty to anything. But it is said, if you allow proof of intention where the description is not applicable with certainty to any person or thing, you are allowing a nuncupative will. But if this be an objection at all, it is equally an objection in cases where proof of intention including declarations of intention is allowed. Wherever it is impossible to discover the testator's intention without having recourse to parole evidence of declarations he has made as to his intention, the will is remarkably like a nuncupative one. The real ground apparently for the distinction is that in the one class of cases the testator has described, and described accurately, the person or the thing intended, although it turns out that the description fails in identifying; in the other class the testator has not given such a description. In the latter



class we endeavour to discover the meaning of the words used by the testator; in the former we do know the meaning of the words used, but that is not sufficient, and we have to resort to direct evidence of his intention.

*Master and Servant Act 1867—Contract in writing.*—Some time ago we reported a decision of the Sheriff-substitute of Aberdeenshire (*ante*, vol. xviii. 614), to the effect that it was not necessary that the contract of service should be in writing to warrant a complaint under the Master and Servant Act 1867, against a servant for not entering his service. Mr. Fraser, in his book on Master and Servant (p. 737), entertained a different view, holding that in such a case the contract must be in writing. So that one law existed in Aberdeenshire and another in Renfrewshire. A servant brought up under the above-mentioned Act would be convicted in the former county, while he would have got off scot free if he had had the good fortune to reside in the latter county. Having no means of obtaining a judgment of our own Supreme Court, we have been obliged to wait until a judgment upon the point was given by the Supreme Court in England; the Act happening to apply to England as well as to Scotland. Let us trust that this state of affairs will not long continue. However, we have at last got a decision (*Banks v. Crossland*, 44 Law Journal Reports, Mag. Cases, 8); and it is in favour of the view stated by Mr. Fraser. The difficulty was this: the Master and Servant Act says (section 2), the words "contract of service" shall include any contract, *whether in writing or by parol*, to serve, etc. But then the third section states that "nothing in this Act shall apply to any contract of service other than a contract within the meaning of the enactments described in the first schedule to this Act or some or one of them." Among the Acts enumerated in the first schedule is the Act 4 Geo. IV. cap. 34. The third section of that Act provides that if a servant shall contract to serve, etc., and shall not enter into or commence his service according to the contract, *such contract being in writing and signed by both parties*, or having entered shall absent himself before the term of his contract, whether such contract shall be in writing or not in writing, be completed, he is liable to a certain punishment. There is at least an apparent inconsistency between the second and third sections of the Act of 1867. But it has now been held by the Court of Queen's Bench, that as the Act of 1867 applies only to contracts within the meaning of the enactments in the first schedule, and as under these it is necessary, where the complaint is for not *entering* the service, that the contract be in writing and signed by both parties, a complaint of that nature where the contract was not in writing falls to be dismissed. Mr. Justice Lush endeavoured, and as he thought successfully, to find a solution of the difficulty arising from the seeming contradiction of section 2 by section 3. The object of the Act was to collect into one Act the law contained in a number

of previous enactments. This being the case, the interpretation clause in defining "contract of service" gave a definition so large as to include all the contracts to which any part of the law as thus collected could apply. There is, says the learned Judge, no contradiction between these above-mentioned sections. "Where the servant has actually entered into the service, a verbal contract is sufficient; but where the breach is not entering into the service, a written contract is required." The explanation is neat; but probably the true reason of the discrepancy is that the draughtsman of the Bill did not happen to remember at the time the provisions of the Act of George IV.

In *Crane v. Powell*, 38 L. J. Rep. (M. C.) 43, Mr. Justice Brett stated that he had very considerable doubts whether it was necessary to give jurisdiction that the contract should be a written one. In the case under notice Mr. Justice Blackburn remarked, that the reason for these doubts was not stated, and he confessed he could not understand the difficulty.

*Medical Act, 1858.*—A practitioner, registered as a surgeon under the Act of 1858, was found not entitled to recover his charges for advice and medicine in a case not requiring surgical treatment. (*Leman v. Fletcher*, 42 L. J. Reports, Q. B. 214). Thereafter he qualified, and had himself registered as a medical practitioner, and thereupon he raised an action for medical services rendered prior to his becoming qualified. Of course the Court held that it was impossible to cure the want of qualification at the time; the people whom he had attended had not had the benefit of the services of a qualified medical practitioner. The first of these cases is similar to the case in the Sheriff Court at Airdrie, noted *ante*, vol. xviii. 618, with this difference, that in Leman's case it was the medical qualification which was wanting, and the Old Apothecaries' Act (55 Geo. III. c. 19, ss. 19 and 21) of itself would have been sufficient, independently of the Medical Act of 1858, to bar his claim. But, as the Judges in the case under notice state that a new requirement, viz., registration, has been added by the Act of 1858, non-compliance with which deprives a practitioner of the right to sue for his charges, and as they held that the plaintiff was not entitled to sue for medical charges although registered as a surgeon, it is clear that a practitioner can recover charges only for services rendered in the capacity in which he is registered. Although the want of qualification at the time the services are rendered is an incurable defect, yet, said Mr. Justice Blackburn, it might be that registration at any time before the trial would be considered a sufficient compliance with the requirement of the Act.

*Collaborateur.*—The leading case of *Wilson v. Merry and Cunningham* in the House of Lords (6 M'P. H. L. 84) established the principle that a foreman or manager of a mine is, as regards the liability of the owners, a fellow-servant of the workmen employed there.

Lord Chelmsford, it will be remembered, added that the Mines Regulation Act (23 & 24 Vict. cap. 51), which, *inter alia*, required the owner, under a penalty, to provide proper ventilation in the mine, did not affect the question of civil liability, and gave a workman no right of action against the owner which he would not otherwise have had but for the statute. A question as to the effect of the new Mines Regulation Act (35 & 36 Vict. cap. 76) came before the Court of Queen's Bench in the case of *Howell v. Landore Siemens Steel Company* (44 Law Journal Reports, Q. B. 25). This Act requires the owner of the mine to appoint a manager, holding a certificate under the Act; and certain duties are imposed and certain powers are conferred on him by the rules contained in the Act. It was argued that this requirement altered the position of the manager, and gave him such a peculiar character, that he could no longer be regarded as a fellow-servant of the workmen; and that, consequently, the owner was liable for injury caused to a workman by the negligence of the manager. But the Court held that the Act did not alter the manager's position in regard to the matter in dispute. If the manager had been appointed by the owners independently of the Act, and invested by them with the powers which it conferred, the manager would have been still a fellow-workman with the other servants in the mine, and the fact that the owner was compelled by the Act to make the appointment could make no difference.

*Patents.*—The period for which a patent may be granted is fourteen years. Formerly a prolongation of the term could be made only by Act of Parliament. Now by statute an application may be made (before the expiration of the original term) to the Privy Council, who, on hearing all parties interested, may report in favour of an extension of the patent for a term not exceeding seven years (5 & 6 Will. IV. cap. 83, sec. 4; 2 & 3 Vict., cap. 67; 15 & 16 Vict. cap. 83, sec. 40). An application of this kind came before the Privy Council in the case of *Crichton*, February 16, 1875. The petitioners were patentees of an invention used in the cotton manufacture. It was patented during the American civil war, when the supply of American cotton ceased, and manufacturers were obliged to have recourse to Surat cotton, an inferior description of article, and much more difficult to work. The invention proved a useful and meritorious one, and had the effect of greatly adding to the value of Surat cotton. The application was founded on the meritorious character of the invention, and on the fact that the patentees had from circumstances been prevented from reaping the natural fruits of their skill and ingenuity. But it was found that the patentees had netted a sum of no less than £39,000, and their Lordships of the Privy Council held that they had very little reason to complain. The prolongation of the term of the patent was not a matter of right, and there was no case where the term had been prolonged where the profits arising from the patent had been so large.

Several cases of interest have during the last month been decided in the Court of Exchequer Chamber.

*Innkeeper's Lien.*—Mr. M'Laren, in his edition of Bell's Commentaries, ii. 99, says that in England the lien of innkeepers attaches to the goods of another person brought to the inn without notice, "but not to such goods brought for temporary use, as a piano hired by the guest," and the authority given is *Broadwood v. Granara*, 10 Ex. 417. A case raising the point, *Threfall v. Borwick*, was decided in the Exchequer Chamber, February 4, 1875. A person went to a hotel, and took with him, as his own, a hired piano. It was received as part of his goods. He resided in the hotel a considerable time, and left in debt for his board and lodging. The innkeeper claimed to detain the piano as against the owner in the exercise of his lien. The Court, affirming the judgment of the Queen's Bench (L. R. 7, Q. B. 711), held that his lien did extend to the hired piano. The case differed from that of *Broadwood* in this respect, that the innkeeper in *Broadwood's* case knew that the piano did not belong to the guest, and that he did not receive it as part of the guest's goods. In *Broadwood's* case there is a dictum by Baron Parke to the effect that the innkeeper's lien only extends to goods which he is bound to receive. But this notion was repudiated both by the Queen's Bench and the Exchequer Chamber. The innkeeper's obligation to receive the guest and his goods may be the origin of his lien; but the origin is one thing and the extent of the lien is another thing. A carrier, for example, is bound to receive and carry goods, and he has therefore a lien for the carriage; but if he receives and carries goods which he is not bound to carry, he has his lien all the same. By receiving the goods the innkeeper makes himself responsible for their loss if they should be stolen; and the measure of the liability must be the measure of the lien. If he chooses he receives the goods; that is enough. Further, the judges stated it is not to be assumed that in a case where a person contemplates a residence of some duration, an instrument of recreation like a piano is an article which an innkeeper is entitled to refuse. Would an innkeeper be entitled in such a case to prevent a guest bringing a fiddle with him? But it might happen that the guest with musical tastes could not play the fiddle, but could perform on the larger instrument; and it would be hard to deprive him of his harmless amusement. In determining what articles an innkeeper is to receive, and over which his lien usually extends, we must, says Coleridge, J., in *Turrill v. Crawley*, 18 L. J. Rep., Q. B. 155, give effect to the changing usages of society. In that case, in noticing an attempted distinction between carriages and horses, he says, the fact that the most of the decisions are with respect to horses is "obviously explainable by the reference to the mode of travelling in former times. New usages have sprung up; and as carriages are commonly used in travelling, the innkeeper's duties and privileges

are extended to them." It is not to be supposed that the landlord's lien or liability exists only in cases of parties actually travelling. The mere circumstance of rooms in an inn being engaged for a length of time at a set price would not *per se* make the guest a lodger. *Parker v. Flint*, 5 Mod. 255.

The case of Broadwood is clearly overruled, so far as the decision may have been founded on the doctrine that the lien extends only over such things as the landlord was bound to receive; and it is also overruled, so far as it was founded on the temporary use of the piano, for in the former case the instrument was possessed for a longer period than it was in the latter.

*Marine insurance—Slip—Policy.*—In *Lishman v. Northern Maritime Insurance Company* a point of great interest to those interested in marine insurance was decided by the Court in error. As every one knows, "a slip" is usually given before the policy of insurance is granted. "But the slip is often nothing more than an offer or proposal of terms preliminary to the contract" (Addison on Contracts, 493, 494.) The slip of itself forms no contract, and there is no binding agreement between the parties until the policy is signed (*M'Kenzie v. Coulson*, 8 Eq. 368). But what if the inchoate contract is completed by a policy of insurance? The person insuring is bound to communicate every material fact prior to entering into the contract. At what date does his obligation in this respect cease—at the time the slip is given or the time the policy is granted? In *Lishman's* case, after the slip was issued, the person insuring became aware that the ship had been lost. The Court of Common Pleas held, and their judgment has been affirmed in the Exchequer Chamber, that the party insuring was under no obligation to communicate. As Mr. Baron Bramwell remarked, if the slip was given out, and afterwards the policy was executed, nothing which could occur in the interval between the slip and the policy was material to be communicated. This decision is the same as that given in *Corry v. Paton*, 43 L. J. Rep., Q. B. 181. The *ratio decidendi* in this last-mentioned case is that, "according to the usage of those engaged in marine insurance, the initialing of the slip constitutes a complete and final contract, binding upon them in honour and good faith, whatever events might subsequently happen," and that consequently the assured need not communicate to the underwriter facts material to the risk insured against, which came to his knowledge between the time of initialing the slip and that of signing the policy. In *Lishman's* case, when it was before the Court of Common Pleas, Mr. Justice Keating stated, that although a slip might be ineffectual as a contract, if no policy followed, yet, when a policy was granted, the risk changed at the moment of granting the slip.

In *Lishman's* case a term was inserted in the policy which was not indicated in the slip. The term was to the advantage of the underwriter, and, said Mr. Baron Bramwell, it would be a singular

result if, when the underwriter was asked to give out the policy, he had some words inserted in it for his own advantage, this gave him a right to ask for some further disclosures. It may be observed, that a proposal to make an alteration of the terms in favour of the underwriter will not be received by the assured in a grudging or illiberal spirit when he knows the ship is already lost.

*Liability of Corporation and its Servants.*—A highway board, constituted under the Act 25 & 26 Vict. c. 61, ordered the removal of an obstruction from a disputed highway. They had no right under the Act of Parliament to determine what was or was not a highway, or to use force in removing the obstruction. A clause in the Act protected the members of the board from liability by reason of any "lawful act done by them in execution of the powers of the board." On action being raised against the surveyor who had executed the illegal order, and against the members of the board individually, Kelly, C.B., directed a non-suit, on the ground that the action should have been brought against the board, not the individual members. The majority of the Court of Exchequer ordered a new trial; holding that the board's action was *ultra vires*, that a trespass had been committed for which the members of the board were personally liable, and that the surveyor was liable on the general principle that a servant who does an unlawful act cannot justify it on the ground that it was done by order of his master or employer,—a principle which applies equally whether the employer acts in a public or in a private capacity. The Court of Exchequer Chamber have held that the surveyor was clearly liable. The liability of the board was not so clear. But at least the trial should have been allowed to proceed, and accordingly a new trial was granted. *Mill v. Hawker* (43 L. J. Ex. 129), in Exchequer Chamber, February 12.

*Implied Warranty.*—The corporation of London advertised for offers to build a bridge according to certain plans and specifications, the work to be completed in three years. The plaintiff, after having seen the plans and specifications, which had been prepared by the corporation's own engineer, accepted the contract. The work was begun, but it turned out that it could not be completed in the manner contemplated, and an alteration was made, in consequence of which the work took much longer time than three years. The contractor was paid for his extra work, but he raised an action for the damage he had sustained by the delay and loss of time. He had been prevented from accepting other contracts. The Court of Exchequer held that there was no implied warranty by the corporation of London that the plans were practicable, or that the work could be completed within the time specified. The contractor had the opportunity of seeing the plans, etc., and it was for him to ascertain whether the work could be done in the time. It might be that, when the alteration was made in the mode of executing the work, the contractor might have refused to go on with the contract, not having contracted to execute the work in that way. But he

had not objected; he had proceeded with the work, and there was nothing for which he had any claim to be indemnified. The Court of Exchequer Chamber have sustained this judgment. Blackburn, J., said the mode of execution stated in the specifications (the method of supplying foundations) was no part of the work any more than the scaffolding, it was only a mode of doing it. Brett, J., did not agree with this view. If the method of supplying foundation was no part of the work any more than the scaffolding, why was it in the specifications? The contractor might have thrown up the job when he found it could not be executed in the way originally contemplated. There could be no implied warranty of the practicability of the plans or implied undertaking to indemnify if they turned out not practicable; for an undertaking can only be implied when it is to be presumed that it is in the minds of both parties. The contractor had no right to assume the practicability of the plans. He ought to have inquired for himself, and not having done so, he must take the consequence. A writer in an American law journal, commenting on the decision of the Court of Exchequer, expresses his surprise at the result, and he cites a host of authorities to show that a contractor was entitled to charge for extra work. But, as we have shown, the claim was not for extra work, but for compensation for the loss caused by the delay. *Thorn v. Mayor, etc., of London*, 43 L. J. Ex. 114, in Exchequer Chamber, February 10, 1875.

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### The Month.

*Faculty of Procurators, Dundee.*—The annual meeting of this body was held on Thursday, 4th February, when the following office-bearers were elected:—*Preses*, Mr. John Boyd Baxter, LL.D.; *Vice-Preses*, Mr. David Rollo; *Secretary*, Mr. John A. Swanston; *Treasurer*, Mr. George Heron. The Faculty also resolved to adopt the new table of fees lately adopted by the Writers to the Signet.

*The Preservation of the Appellate Jurisdiction of the House of Lords.*—The following is a list of the members of the Committee for Preserving the Jurisdiction of the House of Lords as a Court of Final Appeal for the United Kingdom:—Sir John Dugdale Astley, Bart, M.P.; Sir William Bagge, Bart, M.P.; Edward Bates, Esq., M.P.; the Right Hon. the Earl of Bective, M.P.; J. P. Benjamin, Esq., Q.C.; Sir George Bowyer, Bart, D.C.L., M.P.; Isaac Butt, Esq., Q.C., M.P.; William Romaine Callender, Esq., M.P.; Frederick Calvert, Esq., Q.C.; Montagu Chambers, Esq., Q.C.; William Thomas Charley, Esq., D.C.L., M.P.; Arthur Cohen, Esq., Q.C.; William Edward Dowdeswell, Esq., M.P.; Colonel Richard Dyott, M.P.; the Right Hon. Lord Gormanstown; the Right Hon. the Marquis of Hamilton, M.P.; William Housman Higgin, Esq., Q.C.; Joseph Napier Higgins, Esq., Q.C.; William Nicolson Hodgson,

Esq., M.P.; the Right Hon. Lord Houghton; Sir George Jenkinson, Bart., M.P.; Sir John Kennaway, Bart., M.P.; Thomas Knowles, Esq., M.P.; Henry Charles Lopes, Esq., Q.C., M.P.; J. Fraser Macqueen, Esq., Q.C.; Henry Matthews, Esq., Q.C.; Edward Leigh Pemberton, Esq., M.P.; the Right Hon. Lord Penzance; the Right Hon. Earl Powis; Mr. Serjeant B. Coulson Robinson; Thomas Salt, Esq., M.P.; Mr. Serjeant Frederick Lowten Spinks, M.P.; John Piers Chamberlin Starkie, Esq., M.P.; the Right Hon. Sir John Stuart; Phillip Twells, Esq., M.P.; Samuel Banks Waddy, Esq., Q.C., M.P.; Robert Griffith Williams, Esq., Q.C.; Watkin Williams, Esq., Q.C., M.P.; the Right Hon. James Stuart Wortley, Q.C.; Sir Edmund Beckett, Bart., Q.C.; John Chas. Day, Esq., Q.C.; Chas. Springel Greaves, Esq., Q.C.; Alex. Stavely Hill, Esq., Q.C., M.P.; Morgan Howard, Esq., Q.C.; John Robert Kenyon, Esq., Q.C.; Morgan Lloyd, Esq., Q.C., M.P.; John Patrick Murphy, Esq., Q.C.; the Hon. Alfred H. Thesiger, Q.C.; Alfred Wills, Esq., Q.C.; Henry Thomas Cole, Esq., Q.C., M.P.; Hardinge Giffard, Esq., Q.C.;—Kingdon, Esq., Q.C.; Sir Thomas Gladstone, Bart. of Fasque; John Shapter, Esq., Q.C.; with power to add to their number. Copies of a memorial prepared by the Committee, and addressed to the Lord Chancellor, lie for signature at Sir George Bowyer's chambers, 13 King's Bench-walk, Temple; and at 16 St. James's-place, S.W.

*A French Daniel come to judgment—Bill payable on St. Fortunatus' Day.*—We take from the *Journal des Debats* of 22nd January last the following case, which was recently determined in a French Justice of Peace Court. Dubois sues Genin for 150 francs, contained in a bill payable on St. Fortunatus' Day. *Defence:*—Defender is willing to pay when the day of payment arrives. It is for plaintiff to show that his bill is at maturity. The Judge pronounced the following decree:—In respect the defender acknowledges his signature to the bill as genuine; that to avoid fulfilment of his obligation the defender objects that the bill has not attained maturity, St. Fortunatus' Day not being come and gone; in respect we have ourself vainly sought the name of St. Fortunatus in every calendar; considering, on the other hand, that it is not for us to determine whether the said Fortunatus be a saint or not, and that the quality of saint must be taken as belonging to him, since he is so designated in the bill in question; considering further that the first day of November is the feast-day of all the saints, and chiefly of those for whom no place has been provided in the calendar, and consequently must be taken as the feast-day of the said Fortunatus, described as a saint in the bill: Decerns against the defender to pay the sum of 150 francs, together with legal interest, on 1st November next, with costs.

In an old anonymous case, believed to have been tried before Lord Macclesfield, which is referred to by Lord Hardwicke in *Simpson v. Vaughan* (2 Atkins, 32), the question was as to the validity of a promissory note, in which the granter, after acknowledging receipt



of the money, added the words, "which I promise *never* to repay." The Court held it a good promissory note, on the ground that the words must have been inserted either *per incuriam*, or fraudulently. This might hold in England, where a document may be good, as a bill or note, although it does not express any term of payment,—the note in that case being held payable on demand. *Whitlocke v. Underwood*, 3 D. and R. 356; *Ellis v. Mason*, 7 Dowling, 598. With us the document would be simply an acknowledgment of debt. *Braid v. Linton*, 20 D. 731.

*Law and Spiritualism.*—A recent decision in Maine—*Robinson v. Adams*, reported in Redfield's American Cases on Wills, p. 367—has brought into view the relations of law and spiritualism. The question considered in that case was, whether a will executed under the influence of spiritualistic communications is void on account of "undue influence." This also involved the further and deeper question, whether one so influenced was of sound mind in contemplation of law. The grounds chiefly relied upon to show unsoundness of mind or undue influence, were the belief of the testatrix in communications with the spirit of her deceased husband, and her suspicions and belief thereby aroused, that her son-in-law, the contestant, was exposed to the control of evil spirits. The judge did not rule that a belief in spiritual communications was, itself, an insane delusion, but he ruled that it was for the jury to consider how far such a belief showed delusion, and whether that belief was itself an insane delusion. This ruling was sustained by the Supreme Judicial Court on appeal. The court was of the opinion that the question could not be dealt with theologically, morally or scientifically, but that it must be considered legally, as bearing on the single point of insanity or insane delusion. "What our individual and collective opinions as to facts, truth, possibilities or evidence, or claims of this so-called spiritualism may be, has nothing to do with the questions before us. It is only as to the proved effect of this belief on another person's mind that is before us." The court also say that "there is no doubt that the law allows any person to seek advice, suggestions, and opinions from others where no fraud or deception is practised. The law does not limit the range. If a pious man, of sound mind, should seek advice by prayer, and should believe that he had a direct answer, and should regard it not as dictation, but advice entitled to consideration, would any one say that his will would be set aside as made under undue influence? . . . In this case, the widow, it is assumed, thought she had received letters, not from an absent husband, but from one who had gone beyond this world to another, and in them some suggestions as to the disposition of her property. She did not yield implicitly and blindly to these suggestions, but regarded them as she would have regarded such letters if they had been written during life, as friendly suggestions, which had some effect on her mind, but not to the point of destroying her own free will and deliberate judgment."

Judge Redfield, in an elaborate note to this case, takes a different view of the matter under discussion, and lays down the following rule: "All opinions which are incredible in themselves, because contrary to the general course of human experience, and which, nevertheless, are entertained and acted upon by any one in matters of importance, and in a manner which the law will not countenance, where there is no evidence of their correctness, and no argument will dispossess such persons of them, must be regarded as insane delusions." Redfield would thus force upon the courts the decision of the truth or the falsity of spiritualism, and render tribunals of justice, to that extent, tribunals of science. In other words, Redfield would have the courts rule as a matter of law that spiritualistic communications are not facts, but delusions, and that a person acting under the influence of non-existent things, is unduly influenced, and is of unsound mind. As the discussion now stands, we deem it unnecessary to say that the Supreme Court of Maine has taken a moderate and judicial view of the case, and that *Robinson v. Adams* is likely to form a precedent.

In this connection it may be well to mention a circumstance of which we were lately informed. A western justice of the peace who believed in the reality of spiritualism, and who was in the habit of holding communications with the departed spirits of eminent jurists of England and America, was cited by counsel on the trial of a cause to a case in an old volume of reports. The justice immediately "felt the influence," as he expressed it, and seizing a pencil traced a few lines on a sheet of paper. He then announced that he had received a communication from the judges who had decided the case cited, and that they had changed their mind, and now overruled their decision. The justice then declared that the case cited was no longer good law, and overruled the position of the counsel. Whether this be a real or hypothetical circumstance, it illustrates the difficulties which may arise in dealing with modern spiritualism in its relations to law.—*Albany Law Journal*.

*Law Reporting in India*.—An Act was recently passed by the Indian Legislative Council, whose object, as stated in the title, is "to diminish the quantity and improve the quality of law reports." For some years past the law reports of Madras and Bombay have been published under the direction of the High Courts of these Presidencies, while in Bengal there has prevailed a system somewhat analogous to that existing in England of a Council of Law Reporting. The new Act aims at the establishment of one authoritative set of reports for the whole of India. The reporters will be placed under the orders of, and be paid by, the Government, which will undertake the publication of the reports. A chief reporter will be appointed, and all decisions published under his sanction will be binding upon all Courts throughout the country. It is stated that the judges of the Bombay High Court strongly protested against the introduction of the new system, and that the general feeling is decidedly unfavourable to the measure.

## Notes of English, American, and Colonial Cases.

**NUISANCE.**—This action was brought to restrain defts. from filling up a portion of a canal in the city of Buffalo. The common council of said city having power to abate nuisances in any manner they might deem expedient, passed a resolution that a slip or canal, which was a public highway, was unwholesome on account of the stagnant water and filth therein, and to abate the alleged nuisance determined to fill it up, and proceeded to do so. It appeared that the nuisance was caused by the failure of the corporation to exercise the power conferred upon it by its charter, to preserve the canals and slips in the city by preventing obstructions and filth being cast therein, and to remove obstructions therefrom; that it was not necessary in order to abate the nuisance to fill up the canal, but that the obstructions could have been removed at a small expense, and that plt.'s property was seriously injured by the filling up of the canal:—*Held*, that the filling up of the canal was not a proper exercise of the power to abate nuisances, and plt. was entitled to enjoin defts. from doing so; that the power is not unrestricted, such means only are intended as are necessary for the public good. The abatement must be limited by its necessity, and no wanton or unnecessary injury to the property or rights of individuals must be committed.—*Babcock v. City of Buffalo et al.*, New York Court of Appeal, Albany Law Journal, November 21, 1874.

**PACTUM ILLICITUM.**—An agreement to withdraw from a prosecution for felony, provided the person accused will promise to bring no action for trespass and false imprisonment or malicious prosecution, is void, and cannot be enforced; and if the person accused subsequently sues the prosecutor, the action will not be stayed upon the ground that it is brought against good faith.—*Rawlings v. The Coal Consumers' Association (Lim.)*, 43 L. J. Rep. (Ch.), 111.

**BOND.**—*Liquidation*—*Novation*—*Partnership*—*Principal and surety*—*Multifariousness*.—Two partners bound themselves jointly and severally to secure partnership debts. A new partner was taken in, and one retired. The estate of the new firm was liquidated by arrangement under the Bankruptcy Act 1869, ss. 125, 126; the obligees proved and joined with the creditors of the new firm in resolutions accepting a composition, payable by instalments, the deed reserving in terms the rights of creditors against sureties, though the resolutions did not:—*Held*, that the obligees thereby released the retiring partner.—*Wilson v. Lloyd*, 42 L. J. Ch. 559.

**DAMAGES.**—*Principle of assessing under Lord Campbell's Act*—*Compensation for loss of annuity*—*Evidence on matters of opinion*—*Skilled witness*.—In actions under Lord Campbell's Act, 9 & 10 Vict. c. 93, to recover damages for the benefit of a relative to whom the deceased had covenanted to pay an annuity during their joint lives, it is unobjectionable to direct the jury that they may estimate the damages to the annuitant by calculating what sum would buy him an equally good annuity. That sum must depend, in addition to other contingencies, on the probable duration of the lives, and to ascertain that it is material to know the average duration of the lives of persons of the same age as the lives in question. Such average and probable duration cannot be better shown than by proving the practice of life assurance companies, who learn it by experience; evidence may therefore be given of such practice, and tables—which purport to shew the average duration of the lives of persons of all ages and the value of annuities on Government or other very good security for such lives, and to which those companies refer for information—may be consulted to show what is the average and probable duration of the lives in question, and what is the present value of the annuity, provided the attention of the jury be called to the difference in value between an annuity on Government security, and one secured by a personal covenant.—So held *per* Blackburn, J., Keating, J., Grove, J., Archibald, J. (*dissentiente* Brett, J.).—*Per*

Brett, J.: In such cases the only legal direction to the jury is that they must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation. A direction, therefore, which leaves it open to the jury to give the present value of an annuity equal in annual amount to the income lost, for a period supposed to be equal to that which would have continued if there had been no accident, is a misdirection, and any evidence (such as that instanced above) given solely to enable a jury to calculate such present value is inadmissible, because necessarily misleading and legally irrelevant. A person who though not an actuary is acquainted with the business of life insurance is competent to give evidence as to the average and probable duration of lives and the present value of annuities as given by the tables and accepted by life insurance companies.—So held *per* Blackburn, J., Keating, J., Grove, J., and Archibald, J. (*dubitante* Brett, J.). The jury may properly be directed to consider the lives in question as average lives, unless there is evidence to the contrary; and if there is such evidence, it is for the party excepting to the direction to place the evidence on the bill of exceptions.—So held *per* Blackburn, J., Keating, J., Grove, J., Archibald, J. (*dissentiente* Honyman, J.).—*Rowley v. London and N. W. Ry. Co.* (Ex. Ch.), 42 L. J. Ex. 153.

COMPANY.—*Directors*—*Interest of director in contract entered into by his company*—*Interest on money received by trustees improperly but without mala fides*.—The rule that neither a director or other person holding a fiduciary position with regard to a company, nor any firm of which he is a member, may derive profit from any contract with the company, or from the employment of the company's funds in any matter in which he or his firm has an interest, can only be set aside by express stipulation between the parties and on a clear explanation of the full extent and nature of such interest. By one of the articles of association of the I. company, it was provided that the office of a director should be vacated if he should contract or participate in the profits of any contract with the company, or in the profits of any work done for the company without declaring his interest, and no director so interested should vote at any meeting or on any committee of the directors on any question relating to such contract or work. C., who was a member of a firm of stockbrokers, and also a director of the I. Company, proposed to sell to his company a contract for placing railway debentures at a price considerably higher than the price at which his firm had agreed to place them for the railway company. At the meeting of the directors, at which his proposal was taken into consideration, he stated that he had an interest in the sale of the debentures and retired from the board-room. But he did not state distinctly either the nature or the amount of his interest. The proposal was accepted, and C.'s firm cleared a large profit out of the transaction:—*Held*, that he and his firm must refund to the company the whole of the profit derived by him or them from the transaction, with interest at four per cent.—*Imperial Mercantile Credit Association v. Coleman*, (H. L.), 42 L. J. Ch. 644.

STOCK EXCHANGE.—*Close by broker of insolvent principal's account*—*Custom of Stock Exchange*.—A speculator on the Stock Exchange having failed to pay the balance of his broker's account against him when requested, and having died, and a bank, of which he was senior partner, having in consequence stopped payment, the brokers sold out stock which he had directed to be carried over, at a loss, but the stock had fallen still lower before the next account day. On a claim by them for the balance of their next account, which was resisted on the ground that they had broken their contract, and could not speculate as to what would have happened had they kept it,—*Held*, that their conduct at the most gave rise to a right of set-off for any damage resulting from it, and that none being shown, their claim was good. Evidence was given of a custom of the Stock Exchange, that where a principal who had bought for the account became bankrupt or died, leaving no person ready to take up his account, his

broker might cover himself by selling out the shares or stock:—*Held*, by Mellish, L.J., that the custom was reasonable, and that the claim was sustainable on that ground also.—*Lacey v. Hill*, and *Laney v. Hill*.—*Scrimgeour's Claim*, 42 L. J. Ch. 657.

**CONTRACT.**—*Agreement to perform at particular theatre—Implied negative clause.*—Where an actor enters into a contract to perform at a particular theatre during a particular period, a negative stipulation to the effect that he will not perform elsewhere during that period, though not expressed, will be implied.—*Montague v. Flockton*, 42 L. J. Ch. 677.

**CHARTER-PARTY.**—*Freight—Bill of Lading*—"Quantity and quality unknown."—A charter-party, under which a ship was chartered for a grain cargo from the Danube to this country for a certain freight "per imperial quarter delivered," contained a provision that in the event of the cargo, or any part thereof, being delivered in a damaged or heated condition, the freight should be payable on the invoice quantity taken on board as per bill of lading, or half-freight upon the damaged or heated portion, at the captain's option. The bill of lading stated that 1021 kilos. were shipped on board, but the master added, before signing it, "quantity and quality unknown." The cargo having become heated on the voyage, the master claimed to exercise this option, and to be paid freight upon the invoice quantity as per bill of lading:—*Held*, that the addition of the words "quantity and quality unknown" did not take away the master's right to be paid freight on the invoiced quantity in the bill of lading, the object and effect of that memorandum being merely to protect the captain against any mistake that might occur in the invoice quantity in the bill of lading, in case of alleged short delivery or deterioration not by his fault.—*Tully v. Ferry*, 42 L. J., C. P. 240.

**SOLICITOR AND CLIENT.**—*Solicitor partnership—Advance by client to one partner—Liability of other partner for misapplication of money—Scope of partnership business.*—In order to render one partner in a firm of solicitors liable for the misapplication of money entrusted by a client of the firm to the other partner, it must be shown that the money was received by that other partner in the ordinary course of business for the purpose of being invested on a specific security. A mere general statement to the client by the partner who receives the money that the money is to be lent on security to another client is not sufficient to bind the other partner, the receipt of money for the purpose of laying it out generally not being part of a solicitor's business, or within the scope of a solicitor partnership.—*Plumer v. Gregory*, 43 L. J. Rep., Ch. 803.

**PATENT.**—*Infringement—Combination of machinery for particular object in a particular way—Adaptation of same combination for similar object in a different way.*—A patent for a mechanical arrangement, whereby a particular operation may be performed for a particular purpose, the parts of the apparatus so arranged not being new in themselves, but thus first combined for that particular purpose, is not infringed by the adoption of the same arrangement or combination of parts for a similar purpose, if the mode of operation is sufficiently distinct, and different in principle from that which was described or claimed in the patent, and the object achieved is also sufficiently distinct or novel, and does not form an essential part of the patent.—*Saxby v. Clunes* (H. L.), 43 L. J. Rep. (Ex.) 228.

**SALE OF GOODS.**—*Payment of price—Condition precedent—Insolvency.*—Where there is a contract for the sale of goods to be delivered by instalments, the price of each instalment being payable on delivery, and the buyer does not pay for one instalment under such circumstances as to give the seller reasonable ground for believing that he will be unable to pay for the instalments to be delivered in future, and that he does not intend to go on with the contract, the seller is justified in repudiating the contract. *Withers v. Reynolds*, 2 B. & Ad. 882, followed.—*Bloomer v. Bernstein*, 9 L. R., C. P. 558.

**MARINE INSURANCE.**—*Policy on goods—Implied warranty by assured of seaworthiness—Loss by perils of the sea, by ship sinking in harbour from unknown cause—Insurable interest.*—The action was brought to recover upon a policy of insurance signed by the deft. for indemnity in respect of a cargo of rice. On the 2nd of February 1871, the plt. entered into a contract to buy of B. "the cargo of new crop Rangoon rice per *Sunbeam* . . . at 9s. 11½d. per cwt. cost and freight." The ship *Sunbeam* did not belong to either the seller or the plt. She was chartered by the seller's agent to proceed to Rangoon to ship and carry a cargo of rice to any port in the United Kingdom or Continent. On the 3d of February 1871, the plt. effected insurance with the deft. "at and from Rangoon to any port or place of discharge in the United Kingdom or Continent by the *Sunbeam* . . . on rice. The said merchandises are and shall be valued at £5,500." The *Sunbeam* arrived in the Rangoon River on the 3d of March 1873, and began to load a cargo of rice. On the 30th of March, whilst lying at anchor in the river, she sprang a leak from an unknown cause, and sank in the course of the night. At the time of foundering the *Sunbeam* had not finished loading; both the ship and the portion of the cargo on board were totally lost. Before the 30th of March the vessel had been quite free from leakage, and had performed several long voyages, behaving extremely well; she had also been examined whilst lying in the river as to her caulking, which was found in good condition:—*Held*, that upon the above facts there was evidence that the *Sunbeam* was seaworthy when the risk under the policy attached, and that she had been lost by perils of the sea; and held further, that the plt. at the time of the loss had an insurable interest in the rice on board the ship.—*Anderson v. Morice*, 44 L. J. Rep., C. P. 10.

**MASTER AND SERVANT.**—*Servant in husbandry—Contract not in writing.*—Upon complaint against a servant in husbandry under the Master and Servant Act 1867, 30 & 31 Vict. c. 141, for not entering into service according to his agreement, the fact that there was no written contract deprives the magistrates of jurisdiction.—*Banks v. Crossland*, 44 L. J. Rep. (Mag. Cas.) 8.

**TELEGRAPH.**—Plaintiff sent by defendants' telegraph, a message written on a blank containing printed conditions, exonerating defts. from liability for error in transmission, unless the message should be "repeated" at an additional cost. The message ordered the sale of 100 shares of stock, was not repeated, and was transmitted as an order to sell 1000 shares:—*Held*, (1) that the condition was unreasonable and void; (2) that the measure of damages was the amount paid by plt. by reason of an advance in price of the stock to replace the 900 shares sold by mistake.—*Tyler v. Western Union Telegraph Co.*, 60 Illinois Rep. 421.

**TELEGRAPH.**—A telegram was sent over the lines of several companies, and delivered to the person to whom it was addressed, by the last company, on a printed blank containing a notice that the company would not be liable for the default of other companies. There was an error made in transmitting the message, whereby the receiver suffered damage, to recover for which he sued the company, who set up in defence, (1) a statute limiting actions *ex delicto* to one year; (2) that the mistake was made by another company:—*Held*, that the action was *ex contractu*, and so not barred, and that the burden of proving the second defence was on the company.—*De La Grange v. South-western Telegraph Co.*, 25 La. Ann. 383, American Law Review, Oct. 1874.

**TRADE MARK.**—*Lapse of time—Fraudulent intention—Injunction.*—The Court will not refuse to grant an injunction to restrain the infringement of a trade mark, on the mere ground that a great number of years have elapsed since it was first infringed by the deft. But when many years have elapsed before the plt. takes steps to restrain the infringement, the Court will require clearer proof than it would otherwise have done that the trade mark was adopted by the deft. originally with fraudulent intent, and will require the plt. to prove that he has been actually injured by the infringement.—31 Law Times Rep. (Ch.) 285.

**LEGACY.—*Falsa causa.***—Testator having by his will given £4000 to certain charitable institutions, made a codicil as follows: "Presuming and believing that the rental of my estate will produce £16,000 a year, I give those institutions £4000 more." The income of the testator's estate, however, was at his death much less than £16,000 a year:—*Held*, that the testator's reason for the gift of the second £4000 being the supposed increase of his property, and the fact of such increase being incorrect, the gift of this £4000 failed.—Gifts founded on reasons applicable on the one hand to the legatee, and on the other to the testator's property, distinguished.—*Thomas v. Howell* 43 L. J. Rep. (Ch.) 511.

**MARINE INSURANCE.—*Concealment of material facts—Over-valuation of goods—Speculative risk.***—Where the insurer, in effecting a marine policy, does not disclose to the underwriter the fact that the goods insured are largely over-valued, it is a question for the jury whether the concealment is material, having regard to the reasonable practice of underwriters. It is the duty of an insurer to disclose everything which would affect the judgment of a rational underwriter governing himself by the principles and considerations on which underwriters do in practice act, and therefore the jury are justified in finding that an over-valuation of the goods insured is a material fact which ought to have been and was not disclosed; and upon such finding the underwriters are entitled to the verdict.—*Joinder v. Pender*, 43 L. J. Rep. (Q. B.) 227.

**MARINE INSURANCE.—*Policy—Risk during land transit—Restraint of princes—Goods in a besieged town.***—Plts. insured by a policy in the ordinary form of a Lloyd's policy, which was underwritten by the deft., silks from Shanghai to London, *via* Marseilles or Southampton, "and whilst remaining there for transit, with leave to call at any ports or places in or out of the way, for all purposes, including all risks of craft to and from the steamers." The risk insured included "arrests, restraints and detainments of all kings, princes and people," and there was a memorandum in the margin of the policy that the silks should be shipped by, *inter alia*, the Messageries Imperiales steamers. It was found as a fact that the company of the Messageries Imperiales always send goods from Shanghai to London overland through France, and that it was well known among underwriters that goods sent from China to London *via* Marseilles were always sent overland through France. The silks insured were shipped on one of the steamers of the Messageries Imperiales, and reached Paris *via* Marseilles on the 13th of September 1870, but at that time there was war between France and Germany, and the German armies were surrounding Paris, which they completely invested on the 19th of September, so that from that day up to the commencement of plt.'s action it was impossible to remove the silks from Paris. On the 7th of October plts., who had previously sold the silks, gave notice of abandonment to deft. :—*Held*, that the policy was not limited to marine risks, but included those during the land transit through France. *Held*, also, that by reason of the siege of Paris there was such a constructive total loss of the silks by restraint of princes within the terms of the policy as to entitle plts. to abandon and sue deft. for a total loss. *Held*, further, that plts. did not lose their right of abandonment by a previous sale of the silks.—*Rodocanachi v. Elliott*, 43 L. J. (Ex. Ch.), C. P. 255.

**PRINCIPAL AND AGENT.—*Agent to buy receiving money from vendor.***—Deft. having been authorized by plt. to purchase on his behalf a particular ship as cheaply as she could be got, made an arrangement, without plt.'s knowledge, with the vendor's broker, who had a right to retain the excess of the purchase money over £8500, by which deft. purchased the ship for £9250, and retained for his own use £225, part of the excess :—*Held*, that plt. was entitled to the amount so retained by deft., inasmuch as it was a profit acquired by an agent in connection with his agency, without the sanction of his principal, and that it could be recovered in an action for money had and received.—*Morison v. Thompson*, 43 L. J. Rep. (Q. B.) 215.

**POWER OF APPOINTMENT.**—*General absolute bequest to object of the power.*—Testator, having a power to appoint the income of a fund to his wife for life, and no other power of appointment, by his will directed payment of his debts, and then, by a separate clause, devised all property, of whatever description belonging to him, "or over which he might at his decease have any power, disposition or control," to his wife, her heirs and legal representatives, in full property for ever absolutely :—*Held*, that the will operated as an exercise of the power.—*In re Teape's Trusts*, 43 L. J. Rep. (Ch.) 87.

**PRINCIPAL AND AGENT.**—*Fraud of agent of incorporated company.*—An action of deceit will lie against an incorporated company for the fraud of their agent if the fraud of the agent is the fraud of the company, and the company is benefited thereby. L., a merchant of New Brunswick, consigned goods to the appellants at Liverpool. The appellants accepted L.'s bills, sometimes for goods received and sometimes on the guarantee of the respondents, an incorporated banking company. The appellants telegraphed to L. that certain of these bills would not be accepted unless certain guarantees were remitted. The manager of the bank telegraphed a reply, "Sent last mail, L." This was true, but at this time L. had become insolvent. The appellants accepted the bills, and their acceptances were placed to the credit of the respondents :—*Held*, that the respondents were liable to make good the amount of the bills so accepted.—*MacKay v. Commercial Bank of New Brunswick*, 43 L. J. Rep. (P. C.) 31.

**PRINCIPAL AND AGENT.**—The rule that an agent must account to his principal for any secret profit made in the course of his agency does not apply where the principal is aware that the agent is remunerated by some allowance from the other parties, but is under a misapprehension (but not misinformed) as to its actual extent.—*Great Western Insurance Co. of New York v. Cunliffe*, 43 L. J. Rep. (Ch.) 741.

**SALE.**—*Liability of seller on failure of articles sold.*—Deft. agreed to sell to plt., in March 1872, a quantity of potatoes upon the following terms, which were committed to writing :—"Two hundred tons of Regent potatoes grown on land belonging to Coupland (the seller) in Whaplode, at the rate of £3, 12s. 6d. a ton, to be delivered in September or October, and paid for as taken away." At the time of the contract deft. had twenty-five acres actually sown with potatoes, and forty-three acres ready for sowing. The forty-three acres were afterwards sown, and the whole together were amply sufficient under ordinary circumstances to produce 200 tons. In August a great part of the crop was injured by disease, and deft. could only deliver about eighty tons :—*Held*, in accordance with *Taylor v. Caldwell* (32 Law J. Rep., N. S., Q. B. 164), that the contract was subject to an implied condition that deft.'s land should produce the stipulated quantity of potatoes; and the crop having failed, without any suggestion of negligence on the part of deft., he was not liable.—*Howell v. Coupland*, 43 L. J., Rep. (Q. B.) 201

**SHIPPING.**—*Liability of owner upon contract with master for supplies to ship in foreign port, where agent has been appointed.*—The master of a ship has no power to pledge the owner's credit for requisite supplies to her in a foreign port at which a solvent agent for her has been appointed; and a ship-chandler who, in ignorance of there being an agent at the port, furnishes goods or advances money for the ship's use upon an order given by the master without the owner's authority, cannot recover the price of the goods or the amount of the loan from the owner, if at the time of supplying the goods or advancing the money he had the means of knowing that an agent able and willing to furnish what was requisite for the ship had been appointed by the owner to act at the foreign port. *Quære*, whether a merchant, who being in "invincible ignorance" of the appointment of an agent, furnishes requisite supplies to a ship upon an order given by the master without the owner's sanction, can recover the price thereof from the owner. *Semble*, that he cannot.—*Gunn v. Roberts*, 43 L. J. Rep. (C. P.) 233.



**SHIP.—Charter-party—Demurrage—Delay in loading.**—"To be loaded with the usual dispatch of the port."—By charter-party the master of the plt.'s vessel, the *D.*, engaged to receive on board and load a cargo of coal at the port of *L.*, "to be loaded with the usual dispatch of the port, or if longer detained to be paid 40s. per day demurrage," and the defts. engaged to load upon the above terms. The loading was to take place at the *B.* docks, and by one of the regulations of the docks no coal agent was to be allowed to have more than three vessels in the *B.* docks loading and to load at the cranes at one time. The defts. acted as their own coal agents, and when the charter-party was entered into they had three ships loading in *B.* docks, and ten other charters in their books having priority over the plt. In consequence of these engagements the *D.* was not allowed to go into the *B.* docks until thirty days after she was ready to do so :—*Held*, that the contract by the defts. was absolute to load with the usual dispatch of the port of *L.* ; that the *D.* had not been so loaded ; and that the defts. were therefore liable to pay for the delay. *Tapscott v. Balfour*, Law Rep., 8 C. P. 46, distinguished.—*Ashcroft v. Crow Orchard Colliery Company, Limited*, 9 L. R. (Q. B.) 540.

**COMPANY.—Liability of directors—Overdrawn banking account—Issue of unpaid shares—Misrepresentation.**—Directors of a company are not to be held personally liable to find cash for cheques drawn by them as officers of their company upon the company's bank, and which the bank may choose to honour when the company has no funds at the bank. A letter written by such directors at a time when the company has funds at the bank, requesting the bankers to honour cheques of the company drawn in a particular manner, is only an intimation not to treat cheques as cheques of the company, unless signed in that manner ; it is not any representation either of any authority in the directors to overdraw the account or that there will be funds forthcoming to answer the cheques, and it does not imply any undertaking on the part of any director signing it that he will personally pay or be answerable for any cheques, though drawn in that particular manner, if they should not be paid by the company.—As neither the directors who signed such letter nor those who, by cheques drawn in conformity therewith, subsequently overdraw the account incur any personal liability, so neither do such directors as at subsequent meetings confirm the letter, or acquiesce in the cheques drawn in conformity with it.—Bankers, to whom on such cheques large sums were owing by a railway company, having obtained a transfer to two of their number of preference shares, on which nothing had been paid, as a collateral security for the advances made by them :—*Held*, that as on the literal construction of the correspondence which resulted in the transfer there was nothing to show that the shares were to be fully or at all paid up, there was no misrepresentation or liability on the part of the directors to pay what was due upon the shares. But that under the circumstances the bankers were entitled to be relieved from liability in respect of such shares, and to have their names cancelled in the register of the shareholders of the company. The House of Lords refused to delay the order for payment by the appellants, the bankers, of the respondents' costs until after the names should have been taken off the register.—*Beattie v. Ebury*, 44 L. J. Rep. (Ch.) 20.

**COSTS.—Tenant for life—Protecting inheritance by opposing Railway Bill in Parliament—Arbitration under Lands Clauses Consolidation Act.**—The tenant for life of a settled estate is not entitled to throw upon the estate his costs of opposing in Parliament a bill brought in by a public company for taking part of the estate. But he is entitled to charge the estate with the costs, charges and expenses properly incurred by him in or about an arbitration entered into between him and the company under the provisions of the Lands Clauses Consolidation Act regarding the value of the land, on the ground that under the Act he is made the fiduciary agent for such purposes on behalf of the estate.—*In re Earl Berkeley's Will*, 44 L. J. Rep. (Ch.) 3.

**MARINE INSURANCE.—Insurance on chartered freight—Total loss of freight where no total loss of ship.**—By a charter-party, which contained the usual

exceptions of dangers and accidents of navigation, the plt.'s vessel was to proceed with all convenient speed from Liverpool to Newport, and there load a cargo of iron rails for San Francisco, and the freight was to be paid by the charterers on right delivery of the cargo. The plt. effected a policy of insurance with the defts. on the chartered freight on that voyage. The vessel proceeded from Liverpool to Newport, but before arriving there she took the rocks at Carnarvon Bay, where she remained for a considerable time. She was ultimately got off, and brought back to Liverpool, but though the damage she had sustained was not such as to constitute a total loss of the ship, the time necessary for getting her off and repairing her, so as to be a cargo-carrying ship, was so long as to put an end, in a commercial sense, to the commercial speculation entered upon by the plt. (the shipowner) and the charterers, and the latter accordingly abandoned the contract, and hired another vessel, by which they forwarded the rails to San Francisco:—*Held*, by the Exchequer Chamber (Cleasby, B., *dissentiente*), affirming the judgment of the Court of Common Pleas, that under the above circumstances the charterers were released from their contract to load under the charter-party, and that there had been a total loss of chartered freight by perils of the seas within the meaning of the policy.—*Jackson v. The Union Marine Ins. Co. Lim.* 44 L. J. Rep. (Ex. Ch.) C. P. 27.

**MARINE INSURANCE.**—*Policy on goods—Implied warranty by assured of seaworthiness—Deck cargo—Loss by jettison.*—The extent and effect of the warranty that the ship is seaworthy, in a policy on cargo, can never be implied to contemplate the destruction, in order to save the ship on an ordinary voyage, of that very cargo which is the subject-matter of insurance; and where a deck cargo was lost by jettison it was held that the jury ought not to have been led to understand, that if the ship could only be made safe for an ordinary voyage by the destruction of the insured cargo, they might, nevertheless, say that the ship was seaworthy.—*Daniels v. Harris*, 44 L. J. Rep. (C. P.) 1.

**MASTER AND SERVANT.**—*Authority—Scope of employment*—A local board of health being in occupation of a sewage farm, had given plenary powers for the management of such farm in the most beneficial manner to one B. A ditch ran between the farm and the land of the plaintiff. With a view to rendering such ditch more capable of carrying off the drainage from the farm, B. wrongfully went upon the plt.'s land and pared away his side of the ditch, and cut down so much of the brushwood and underwood on the plt.'s side as impeded the flow of drainage along the ditch:—*Held*, that the acts so done by B. were not within the scope of his employment, and consequently the local board were not liable for them at the suit of the plt., there being no implied authority from the board to do them.—*Lord Bolingbroke v. The Local Board of Swindon New Town*, 9 L. R. (C. P.) 575.

**TRUST AND TRUSTEE.**—*Negligence.*—A trustee, who had no actual knowledge of his right to real property, suffered an adverse title to be acquired by lapse of time. A bill to make him accountable was dismissed.—*Youde v. Cloud*, 44 L. J. Rep. (Ch.) 93.

**NEW TRIAL.**—*Inadequacy of damages in action for slander.*—In an action for slander imputing that plt. had committed perjury, the jury found a verdict for plaintiff; damages, one farthing. The verdict was not satisfactory to the Judge who tried the cause:—*Held*, that there ought to be a new trial, inasmuch as the amount of damages seemed to have been arrived at by a compromise without duly weighing the circumstances of the case.—*Falvey v. Stanford*, 44 L. J. Rep. (Q. B.) 7; cf. *Stewart v. Caledonian Railway Company*, 26th Oct. 1869, 8 Macph. 486.

**TRADE MARK.**—*Imitation of labels—English adjective denoting quality.*—An English adjective merely descriptive of the quality of an article, such as "nourishing stout," is not by itself entitled to protection as a trade mark.—*Raggett v. Findlater*, 43 L. J. Rep. (Ch.) 64.

**MEDICAL SERVICES.**—This was an action to recover for medical attendance. Plt. attended as a physician upon the daughter of deft., sick at the house of the latter. The patient was of age, and married, and living with her husband. She was taken sick at her husband's house, and brought to her father's that she might be under her mother's care. The husband called plt., stating to him that deft. wanted him to come and see his daughter. This was without deft.'s knowledge or direction. Deft. was present at plt.'s visits, gave a history of the patient's case, and received directions as to her treatment. He told others of the frequency and length of plt.'s visits and his opinion of the case, without disclaimer of liability:—*Held*, that a promise on the part of deft. to pay for the services could not be implied from these facts, nor would the additional facts that deft. had assented to the calling in of another physician for consultation, nor that a bill was sent in to him, unless it was acknowledged or acquiesced in by him. An obligation cannot be implied to pay for services done for another for whom the party is under no legal obligations to furnish them, and the assent of such party to the rendition of such services is not equivalent to an acknowledgment that they are rendered at his request. *It seems*, that in such a case as this a special request upon the part of the father that the physician attend upon his sick child raises no implied promise on his part to pay for the services; it is the duty of the physician to ascertain who is to be responsible therefor. When a judgment upon the report of a referee is reversed upon questions of fact, the question here is not whether this Court would have found the facts as did the referee, but if his findings are not against the weight of evidence, if they might well have been either way, or if the testimony is slight upon which a contrary conclusion is arrived at, the fact that the referee by seeing and hearing the witnesses has a better opportunity to judge of the evidence given by them will lead to an adoption of his opinion.—*Crane v. Baudouine*, New York Court of Appeals, Albany Law Journal, August 1, 1874.

**NEGLIGENCE.**—*Passenger on street car—Contributory negligence.*—Plt., a passenger on deft.'s street railway car, after the same had stopped, left it by the front platform, and, when six or eight feet from the car in the street, was thrown down and injured by the car horses, which had been detached from the car, after plt. had left, and were turning round:—*Held*, that when plt. was injured she was no longer a passenger on deft.'s car, and the fact that she had left such car by the front platform in violation of a regulation of deft.'s road, known to her, did not make her guilty of contributory negligence.—*Platt v. Forty-second St. and Grand St. F. R. R. Co.*, New York Supreme Court of Appeals, Albany Law Journal.

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## The Scottish Law Magazine and Sheriff Court Reporter.

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### SHERIFF COURT OF FIFE.

Sheriffs CRICHTON and BEATSON BELL.

DORWARD v. A. B.—5th December 1874, 29th January 1875.

*Law Agent—Damages for loss arising out of negligence—Proof of loss.*—The facts of this case are fully set forth in the following interlocutor:—

“*Cupar*, 5th December 1874.—The Sheriff-substitute having heard counsel for the pursuer and the defender personally, and considered the closed record, proof and productions, finds, in point of fact, (1) That on the 25th May 1874, the pursuer, through Mr. Donald Macintosh, writer, Forfar, employed the deft. to raise and carry on in the Sheriff Court of Fife an action against Sir John Bethune, Bart., of Kilconquhar, concluding for damages, in respect of an alleged breach of contract to employ the pursuer as an under-gardener; (2) That the

defender accepted said employment, and raised said action, in which, after sundry procedure, a joint minute was lodged, admitting certain correspondence and renouncing further probation, and thereafter, on 23rd June 1874, the S.-S. pronounced an interlocutor, by which he found that, on a sound construction of the correspondence, no contract of service had been concluded between the pursuer and the said Sir John Bethune, and therefore granted decree of absolvitor with expenses; (3) That on said interlocutor being pronounced, the defr. did not present any appeal either to the Sheriff or the Court of Session, and the expenses having been decerned for the pursuer, after being charged, paid the same to the agents for Sir John Bethune; (4) That on 26th June 1874 the defr. wrote a letter, intimating the judgment to Mr. Macintosh, but the said letter never reached Mr. Macintosh, who sent sundry letters and a telegram to the defr. during the time when an appeal was still competent, urging the defr. to let him know what position the case was in; but the defr., although thus made aware that his intimation had failed to reach the pursuer, or his agent, preserved unbroken silence, and it was only by employing another Cupar agent that the pursuer at length ascertained that the case had been decided against him; (5) That the pursuer has not established that, by the failure of the defr. to let him know of the result of the case, any loss has accrued to him, inasmuch as he has failed to prove that the appeal would have been likely to result in a decision in his favour; therefore finds in point of law that the pursuer is not entitled to recover damages, assolizies the defr., and decerns, but finds no expenses due.

A. BEATSON BELL.

"*Note.*—The pursuer, in the course of the argument, based his claim for reparation against the defr. upon two grounds,—1st, that he had without authority and improperly given in the minute renouncing parole proof; and 2nd, that he had failed either to appeal the final judgment or to intimate it to the pursuer in time to allow him to do so.

"As to the first ground, the S.-S. is clear that no claim of damage can lie thereupon. The only proof of the alleged contract was in writing, and Mr. Macintosh had agreed with the defr. that this was so. It was therefore quite judicious to renounce parole proof as to the contract. The pursuer, however, maintained that if the contract had been found proved the terms of the minute would have rendered it impossible for the pursuer to get decree for damages, as no means would have been available for assessing the amount due. The S.-S. is by no means satisfied of this, and according to his recollection of the case, parties stated that if he came to a conclusion in favour of a contract, parties would themselves arrange as to damages, was to the pursuer being taken into Sir John Bethune's service. But no such question did or could arise, and thus the pursuer was in no way prejudiced by the terms of the minute.

"The other ground of liability urged raises questions of greater difficulty. It is no doubt true that an agent is entitled to a large discretion in acquiescing in or appealing against an interlocutor. This was laid down in *Urquhart v. Grigor*, June 1857, 19 D. 854. But the S.-S. is of opinion that the employment to conduct a cause implies also that the agent shall intimate to the client the decision which has been arrived at, and that he shall not be left to learn that the decision has been adverse by the arrival of a messenger-at-arms to charge him on a decree for expenses.

"The defr. contended that, even if he were so bound to intimate, he had done so, that he was not responsible for the miscarriage of the intimation, and that he was not bound to repeat the intimation, even although certiorated by the stream of communications by post and wire that his intimation must somehow have failed to reach the pursuer or his agent.

"The S.-S. is willing to assume that the letter was really written and posted, although the evidence upon the point is rather meagre. In particular, it would have been satisfactory that the clerk who made the copy of the interlocutor had been examined, and stated whether he gave it to his master. But even upon the assumption that the letter was duly written and despatched, the S.-S.

can by no means assent to the proposition that the defr's duty thereupon ceased, notwithstanding his knowledge within a day or two that his intimation had failed to reach. His duty was to *intimate*, not merely to put a letter in the post-office, and although in the great majority of cases the posting would have been enough, yet here he was clearly certiorated that it had not been enough, and the duty of a further communication became plain.

"The S.-S. therefore thinks that the defender failed in his duty; but a further question remains. Did this failure result in pecuniary damage to the pursuer? If not, the S.-S. does not see how the pursuer can recover damages. It was urged that the pursuer was entitled to intimation, so that he might have his chance of an appeal. But how is the S.-S. to estimate the value of this chance? He has carefully reconsidered his judgment in the former case. If he had been satisfied now that that judgment was erroneous, he might have been bound to proceed upon that footing, and to hold that an appeal should have led to a reversal; but, considering the judgment as candidly as he can, he still thinks it is right. In the event of this case going elsewhere, other judges may take a different view, but as that judgment still stands, and the S.-S. thinks it unlikely that any appeal would have altered it, it is plain that in the view of the S.-S. no loss, but on the contrary a gain, from a saving of the expense of appeal procedure, has accrued to the pursuer.

"It was ingeniously urged that even though the pursuer should have determined to acquiesce in the judgment, he suffered loss from not receiving intimation, in order that he might timeously arrange for the payment of expenses. The S.-S. can figure cases where the want of such intimation might have led to clear loss from injury to credit resulting from a charge followed by diligence, but here there is neither allegation nor proof of any such injury, and in point of fact the pursuer was aware, through his other inquiries, although only the day before he was charged, that he had been found liable in expenses. He does not pretend that any injury accrued to him from the charge, or that he could have paid the expenses sooner had he been sooner aware they were due.

"The S.-S. thinks that, as the defr. was in fault in not renewing the intimation, which he could so easily have done, that he should bear his own expenses in this action. A. B. R."

Against this interlocutor the pursuer appealed, and upon the 29th of January last the Sheriff (Crichton) pronounced judgment, recalling the interlocutor appealed against, and finding the pursuer entitled to £8 in name of damages, and also to his expenses. To this judgment the following note was added:—

"*Note.*—The pursuer of this action demands damages in consequence of the defr. having, in a grossly negligent and unprofessional manner, conducted an action in the Sheriff Court of Fifeshire at the pursuer's instance against Sir John Bethune, Baronet, of Kilconquhar.

"In May 1874 the defr. was, through Mr. Mackintosh, writer, Forfar, employed by the pursuer to raise an action against Sir John Bethune for damages in respect of an alleged breach of contract to employ the pursuer as an undergardener. The defr. accepted the employment, and the action was raised. After some procedure in that action, the S.-S., on 23d June 1874, pronounced an interlocutor, assailing Sir John from the conclusions of the action, and finding him entitled to expenses. On 26th June 1874 a letter appears to have been written by the defr. to Mr. Mackintosh, enclosing a copy of the S.-S.'s interlocutor, but this letter never reached Mr. Mackintosh. On 4th and 11th July Mr. Mackintosh wrote to the defr., urging him to communicate what had been done in said action. On 16th July 1874 a telegram was sent to the defr. by Mr. Mackintosh, desiring immediate information as to how the case stood. On 18th July 1874, Mr. Mackintosh again wrote a very pressing letter to the defr., requesting information on the subject. These communications were all received by the defr., but he took no notice of them. On 30th July 1874 the pursuer

was charged for payment of the expenses incurred by Sir John Bethune. On 19th August 1874 these expenses, together with the expenses of the charge, were paid by the pursuer.

"The S.-S. has expressed his opinion that the defr., in not replying to the letters and telegram above referred to, failed in his duty to the pursuer. The Sheriff has no difficulty in concurring in this opinion. The defr. contends that having, in the letter he wrote to Mr. Mackintosh on 26th June 1874, intimated the judgment of the S.-S., his duty was at an end, and that he was not responsible for this letter never having reached Mr. Mackintosh. This view the Sheriff cannot adopt. From the repeated communications, both by letter and telegram which the defr. received, he must have known that his letter of 26th June 1874 had not reached Mr. Mackintosh. The Sheriff is very clearly of opinion that the defr. ought to have returned an answer to the repeated requests made to him for information as to the position of the case at the pursuer's instance against Sir John Bethune.

"But then the question remains, Has the pursuer proved that he suffered damage in consequence of this neglect of duty on the part of the defr.? The S.-S., with reference to this part of the case, finds 'that the pursuer has not established that by the failure of the defr. to let him know of the result of the case any loss has accrued to him, inasmuch as he has failed to prove that an appeal would have been likely to result in a decision in his favour.' No doubt the pursuer has failed to prove that an appeal would have been of any benefit to him. Indeed, the Sheriff thinks it would have been impossible for the pursuer to do this. It cannot be determined with certainty whether the pursuer's claim against Sir John Bethune is well or ill founded until it is submitted to the highest tribunal of the country. The Sheriff has not considered whether, in the case at the pursuer's instance against Sir John Bethune, he would have arrived at a different conclusion from the S.-S. or not. He has read the proceedings in that process, which have been produced in the present case, and he observes that the S.-S., in disposing of it, states that the question between the pursuer and Sir John was one of difficulty.

"Although the pursuer has not proved that an appeal would have been any benefit to him, still he may have suffered loss in consequence of the defr.'s negligence; and the Sheriff, after considering the whole matter, has come to be of opinion that the pursuer has to some extent proved that he has done so. From the opinions delivered by the Court in the case of *Urquhart v. Grigor*, 12th June 1857, 19 D. 853, it appears that where it is sought to impose liability on an agent for neglect of professional duty, it is necessary in most cases to prove loss.

"The damages which the pursuer claims in the present case are, (1) £50, the amount of his original claim against Sir John Bethune; (2) £6, 15s. 3d., the amount of expenses decerned for against him in that action, with 4s. as dues for extract; (3) £1, 8s. 8d., the expenses incurred in charging the pursuer for payment of these expenses; and (4) £4, 4s., being the amount of an account incurred to his own agent in reference to said action.

"With regard to the first of these the Sheriff feels the same difficulty as the S.-S., viz., that there is no proof that the pursuer has sustained this loss. In consequence of the decree of absolvitor in favour of Sir John Bethune having been extracted, the pursuer cannot have the decision pronounced against him brought under the consideration of the Court of Session by suspension. It may be, however, that there are good grounds for setting aside this decree of absolvitor; and it is still possible that the whole matter may be brought under the consideration of the Court of Session in an action of reduction.

"It appears to the Sheriff, that if the pursuer were now to take proceedings by way of reduction, the expenses incurred in the inferior court have been to some extent rendered useless. The expense of charging the pursuer for payment of the expenses incurred by Sir John Bethune would certainly have been saved if the defr. had not neglected his duty. Part of the account also which he has incurred to his own agent is for letters and attendances arising out of the

neglect of the defr. to answer the letters addressed to him. Besides, the pursuer, who lived six miles from Forfar, went repeatedly to call on Mr. Mackintosh in Forfar, with the view of making inquiry as to what had been done in his case.

"The Sheriff thinks that the pursuer has been put to trouble and expense, which he ought not to have been if the defr. had not neglected his duty as his agent; and that to a small extent the pursuer has proved that he has sustained damage. It is difficult to fix the precise amount of the damage which the pursuer has sustained, but the Sheriff thinks that is not over-estimated at £8.

"J. A. C."

*Act.—Scott Moncrieff.—Agent.—W. D. Patrick.—Alt.—Party.*

ROBERT ARCHIBALD, TRUSTEE ON SEQUESTERED ESTATE OF G. H. PRINGLE v. MRS. JANE BEATTIE OR PRINGLE.—25th November 1874 and 18th February 1875.

*Paraphernalia—Chest of Drawers.*—The facts of this case, in which both the S.S. and the Sheriff-Principal decided in favour of the defr., will be learned from the following note to the interlocutor pronounced by the latter on 18th February last :—

"*Note.*—In this case the petr. asks that the respt. Mrs. Pringle be ordained to deliver up to him, as trustee on the sequestered estate of her husband, a wardrobe, forming part of the bankrupt's estate. It is proved that Mrs. Pringle got the wardrobe as a present from her father on her marriage, on 26th February 1872, and that nothing has been kept in it except her wearing apparel.

"In these circumstances, it is maintained for the respt. that the wardrobe belongs to her as part of her paraphernalia. This conclusion the Sheriff is of opinion is well founded, on the ground, that whatever is necessary for keeping the paraphernalia, and is so used, should be considered as having the same character. It is true that the case of *Dicks v. Massie*, 16th January 1695, M. 5821, has been regarded as a decision to the contrary effect. But that case, so far as it dealt with the present question, was overturned by the decision in the case of *Pitcairn v. Peutheror*, 31st July 1716, M. 5825, where it was expressly found that a chest of drawers, appropriated to keeping a wife's clothes, is part of the paraphernalia.

"The petr., in support of his application, relies on two cases in this court, where it was decided that a chest of drawers, in which a wife keeps her clothes, is not part of the paraphernalia :—*Dewar v. Walker*, 1863, *Scottish Law Magazine*, vol. iii., new series, p. 14; and *Donaldson v. Murray*, 1867, *Scottish Law Magazine*, vol. vi., new series, p. 128. The decision of these cases is rested entirely on the case of *Wood v. Hewat*, 24th November 1803, reported by Hume, p. 210, which the learned Sheriff who disposed of the above-mentioned cases considered as a decision to a contrary effect from that pronounced in the case of *Pitcairn v. Peutheror*.

"The Sheriff has examined the report of Wood's case, and it does not appear to him to be a decision to a contrary effect from that pronounced in *Pitcairn's* case. All that was decided in *Hewat's* case is very clearly stated in the rubric, viz., that 'articles of household furniture given to a woman by her relations before marriage are not *inter paraphernalia*.' Among the articles of household furniture enumerated in that case as having been presented to the wife by her friends on the occasion of her marriage is a chest of drawers, but it does not appear that it had been exclusively appropriated to keeping her wearing apparel. Hume, in his *Lectures* (MS., Ad. Lib.), quotes the case only in support of what is stated in the rubric above quoted. Professor Bell (*Prin. sec. 1557*) and Mr. Fraser (*Per. and Domestic Rel. p. 398*), with the case of *Hewat* before them, both clearly state that a chest of drawers appropriated to a wife's clothes is paraphernal, upon the principle, which appears to be a sound one, that whatever is necessary for keeping the paraphernalia, and is so used, should be considered as having the same character."

## ABERDEEN SMALL DEBT COURT.

Sheriff DOVE WILSON.

MACFARLANE V. MACLEOD.—3d February 1875.

*Interest.*—This was an action on an I.O.U., raising a question as to the competency of allowing interest.

Sheriff Wilson, after going over the facts of the case, and deciding that the principal debt was proved, said—The question whether interest is due is one of importance. As the document founded on specifies no time of payment, and contains no stipulation for interest, it cannot be due unless upon the principle that by the law of Scotland interest (except in all but certain well-known exceptional instances) is due to the creditor as damages whenever the debtor has unduly delayed to make payment. Until the matter was unsettled by a recent decision in this Court, in which the principal Sheriff overruled the decision of my colleague (*Aberdeen Commercial Co. v. Gordon*, 13th May 1874), I had always understood that in Scotland interest on money due, but not paid, might be given as damages, apart from any special stipulation. Such was undoubtedly the law of Rome; and that we had adopted that law has been laid down by our best authorities for nearly the last half century. To take the common instance of merchants' accounts, Professor George Joseph Bell, certainly our highest authority on commercial law, says, in his Principles (§ 32), that interest is due from their rendering, and in his Commentaries, from the expiry of the accustomed credit—these two dates being evidently in the usual case the same. As showing what the general opinion of the profession is, I may mention that the sixth edition of the former work, and the seventh edition of the latter, both edited by very accomplished lawyers, give Professor Bell's statement, without hinting a doubt of its soundness. Nor is it in my opinion quite accurate to say, as has been said, that Professor Bell's statement is a mere dictum of his own. Professor Bell gives his authority, and a most instructive one it is. The case of *Bremner v. Mabon* (13th December 1837, 16 S. 213) was decided by Lord President Hope, Lords Mackenzie, Gillies, and Corehouse, and it confirmed an interlocutor by Lord Cockburn. In that case, those judges unanimously allowed interest on a law agent's professional charges from the date of rendering the account. They did so without hesitation, and although the client's case was pleaded by such eminent lawyers as the late Lord Justice-Clerk Hope and Lord Robertson, this point was conceded from the outset. There was in that case a long discussion upon whether interest was due between the date of the last item and the date of rendering, and the Court (as it humbly appears to me with perfect soundness) disallowed it between those dates. They disallowed it even for that period, however, with some hesitation; but to not one of the eminent lawyers engaged did it occur to hint a doubt as to its being due after the rendering. Accordingly, as Professor Bell lays down, that case has been held to settle the law ever since.

It has been said that the case is to be taken as no longer law, because its soundness has been questioned by the First Division of the Court of Session in a more recent case. In the case of *Cardno and Darling v. Stewart* (9th July 1869), the Lord President, as reported in the standard reports, is said to have used the following words in giving the opinion of the Court:—"On the other hand, the defender pleads—'*The pursuers are not entitled to charge interest on a current account as the different items arise, but only after the date of the last item.*' Now I am of opinion that the pursuers' plea is bad, and as the defr. admits by his plea that the pursuers are entitled to charge interest after the date of the last item, it is not necessary to consider anything beyond the question whether the pursuers are entitled to charge interest periodically. On that point, I will only say that I am against the pursuers, and I give no opinion as to whether interest would have run from the date of the last rendering of the account, as that is admitted by the defender." (The italics are mine.) I suspected the



accuracy of that report the moment I read it. It was incredible that judges, whose accuracy is proverbial, would, as this report does, within half a dozen lines, confound two things so distinct as the date of the last item and the date of the last rendering, and upon an admission in regard to the one found an opinion on the other; and it was equally incredible that they would, with hardly an observation, throw doubt upon a decision pronounced by their predecessors, and upon the law which had been taught by Professor Bell, and received upon his authority ever since. On turning to the Jurist Reports to trace the inaccuracy, I find that it and the standard reports are *verbatim* the same, and have evidently been by the same reporter. On turning, however, to the *Scottish Law Reporter*, vol. vi. p. 670, I find an independent report; and there we have a report free from confusion. From it we see that the point on which the First Division refrained from expressing an opinion was "whether interest would have run after the date of the last item," and the reason given is, "for that is admitted by the defender." This makes the matter as plain as can be. The word "rendering" in the last sentence of the standard reports is a mistake for "item," made by the reporter. The correct report shows that what the First Division was doing was, not impugning, but guarding the authority of *Bremner v. Mabon*. It shows that they were only going beyond it, and giving interest from the date of the last item, because the defr. had admitted his liability for it. I may add, however, that even had the Court expressed a doubt in Cardno's case about giving interest from the last rendering, I should not have taken it to be their intention to throw doubt on the received law. There were specialties in that case. The account had been rendered periodically during its currency, apparently without charging interest, and it might reasonably enough have been held that such a course of dealing excluded the creditor from afterwards asking it.

It has also been said that the English law does not allow interest in name of damages; but the English law differs so much that it is impossible to found on it; and our authorities show that on this point we have preferred to follow the Roman law, and also (what I think is) equity. By the English common law it seems that interest was allowed only in very exceptional cases, but this was found to be so bad that the Legislature interfered, and by 3 & 4 Will. IV. c. 42, authorized juries to award interest in certain circumstances. It appears to me that if I were to disallow interest in a case like the present, I should not be assimilating our law to the English, but would be imitating the faults of the old exploded English common law. It also appears to me that the result would not be equitable. I cannot understand why it should be supposed that money should be the only thing which can be withheld in Scotland, after it is due, without the withholder being liable in damages. If I buy coals, and the seller does not deliver them within a reasonable time, according to the custom of his trade, I can sue him for damages, and I cannot see why I should escape if I fail fairly to perform my part of the bargain, and do not pay him at the customary time. As to what is said about the inexpediency of allowing interest, since doing so might encourage the giving of credit, I dissent. The merchant cannot lose his interest, and if he is not to be allowed to charge it openly to those who require time, he must "load" his prices indiscriminately all round with a percentage to cover it, and thus we should make those who don't want credit pay for those who do.

I have entered thus fully into the general question, because I cannot rest the present case on any specialty, and feeling the delicacy of differing in opinion from the principal Sheriff, I have thought it right that my reasons for doing so should be frankly explained. Had I even felt a doubt on the point I should willingly have yielded, but I must administer what I myself believe to be good law, and I cannot abandon the law as decided by the First Division in *Bremner v. Mabon*, and as laid down by Professor Bell, on the strength of a doubt suggested by what I think I have plainly shown to be a mis-report. Applying the general principle to the present case, interest falls to be allowed as damages for delay in payment, and the question of how much is one of circumstances. Judge-

ing from the facts, I think the parties here had intended to treat the transaction very much as if it had been a deposit, and therefore bank interest only will be allowed.

*Act.—W. L. Reid.—Alt.—Watt & Stuart.*

## SHERIFF COURT OF RENFREWSHIRE.

Sheriff FRASER.

A. v. B.—February 1875.

*Filiation cases—Duration of aliment—Amount of aliment and inlying expenses.*—The ordinary practice has been to give £1, 10s. for inlying expenses, and to allow aliment at the rate of 2s. 6d. per week until the age of seven in the case of boys, and ten in the case of girls. In this case the Sheriff allowed £2 for inlying expenses, and awarded aliment at the rate of 3s. per week until the boy should arrive at the age of ten. In the following note, the Sheriff explains his reasons for holding that the old scale is no longer suitable to the circumstances of the present day :—

*Note.*—It has been a settled rule in the Sheriff Court of Renfrewshire for half a century in ordinary filiation cases (meaning thereby cases where the child's health did not require an unusual expenditure) to award aliment at the following rate, and for the following period :—In the case of a boy, the father was decreed to pay aliment until the boy attained the age of seven ; in the case of a girl until she attained the age of ten ; reserving right in either case for the mother to apply for aliment during a further period, in the event of her establishing any special circumstances founded upon the child's health or inability to work warranting such extension of the period. The rate of aliment allowed was 2s. 6d. a week, and £1, 10s. was awarded to the mother for inlying charges. These rules were established long ago, when money went farther than it does now, and when sources of labour were open to a child of seven years of age, which are now closed. The Sheriff has long been of opinion that the law as thus applied worked with great harshness towards the woman ; but the question as to the expediency and justice of these rules has never been raised before him until the present case ; and having come to a decided opinion that the practice in this class of action should be changed, he will shortly state the grounds on which his opinion rests. As regards the *duration* of the aliment he thinks that no change should be made in the rule so far as regards girls. At ten years of age a girl may be able to earn a livelihood by her own labour, and if physically unable to work, or if there be no work for her to do in the market, the usual reservation in the interlocutor enables her mother to apply for an extension of the period. As regards boys, the decisions which are thought to countenance a limitation to the age of seven do not in reality sanction that doctrine. Thus in *Oliver v. Scott*, Mor. 444, decided in 1778, which is sometimes referred to in support of this limitation, the interlocutor of the Court was as follows :—'Restricted the quantum of the aliment to £3 in the year, to be paid quarterly until the child should attain the age of seven years ; and also thereafter until either that the father shall take the child into his own keeping or that the child shall attain the age of ten years, . . . by which time (says another reporter, 5 Brown's Sup., p. 390) they thought he might be able, by herding or otherwise, to gain a livelihood.' In *Paterson v. Speirs*, Mor. 445, decided in 1782, the Court restricted the aliment to be allowed on account of a boy till he attained the age of seven years, with this observation :—'There is no established general rule for determining cases of this nature, which are always to be regulated according to their peculiar circumstances ; and therefore, though in the case of *Fruit and Glendinning*, No. 77 *supra*, the continuance of the payment for aliment, sought by the mother, was protracted to ten years,

the child being a female, yet, in the present, which respects the aliment of a boy, seven years appear a more proper period.' The ground upon which the Court proceeded in this case is not disclosed, and the observation seems to imply that it was intended to decide the general question, that the aliment to be given for a boy was to be limited to seven years. The Lord Ordinary in the cause gave a very intelligible ground for his judgment, restricting the period, which will be afterwards referred to; and if the decision of the Court be regarded as one laying down a general rule, this may be said of it, that it is a rule which subsequent decisions have not supported. The prior decisions, in like manner, were not followed, for in the case of *Caldwell v. Stewart* (5 Brown's Sup. 390), decided in 1773, the Court gave aliment till the boy was twelve years of age. With regard to the subsequent decisions, it was decided in *Ballantyne v. Malcolm* (Hume, p. 424), in the year 1803, that aliment should be given till the boy attains the age of ten years; and in the modern case of *Arnot v. Thomson*, 25th February 1826 (4 Shaw, p. 503), the Court again held that the aliment should be given until the boy arrive at the age of ten. Even, therefore, if the matter rested upon the decisions of the Supreme Courts, the rule restricting the duration of the aliment to seven years is not sanctioned by a uniform course of decisions. But when it is considered that circumstances have very much changed in regard to the value of money and the means of obtaining a livelihood by a young boy, since the end of the last century, it seems right that an alteration should be made to bring the rules on this subject more into harmony with the altered state of things. In one of the cases above referred to, the Court seemed to consider that a young boy could always get employment in herding, and boys above seven years of age might be fit for this occupation; but the remark has force with reference only to agricultural and pastoral counties, and has little application to such counties as Renfrewshire, where, although agriculture is followed, yet the staple means of employment, of a population that exceeds Perthshire and Ayrshire by many thousands, is derived from its manufacturing, mining, and maritime business. Now, as regards manufactures, it is enacted by 37 & 38 Vict. cap. 44, sec. 13, that 'in a factory to which this Act applies a child shall not be employed (a) during the year One thousand eight hundred and seventy-five if he is under the age of nine years; or (b) after the expiration of that year if he is under the age of ten years.' Thus the age of ten years is the period under which no child can be employed in any of the manufactories, and these are numerous in Renfrewshire, falling under the factory statutes. Then the Act 30 & 31 Vict. cap. 146 (the Workshops Act), deals with all other handicrafts by manual labour exercised by way of trade, and prohibits the employment (sec. 6) of any child under the age of eight in any handicraft. The Miners Act prohibits the employment of any boy under twelve years of age under ground (23 & 24 Vict. cap. 151, sec. 7); and no collier apprentice can be under ten years of age. No sea apprentice can be under twelve years of age (17 & 18 Vict. cap. 104, sec. 141). No person can be bound apprentice to a chimney-sweeper under the age of sixteen (3 & 4 Vict. cap. 37, sec. 3); and no child under ten years of age can be employed by a chimney-sweeper elsewhere than in his place of business (27 & 28 Vict. cap. 37, sec. 6). In all these various trades a child of any age could have been legally employed at the time when those decisions were pronounced, which fixed upon the period of seven years; and the question now is, whether it is relevant to take into consideration the shutting up of all these means of labour. In the case already referred to the Court of Session seemed to consider that it was not. In the above case of *Paterson v. Speirs* there is this 'N.B.' appended to the report: 'N.B.—The Lord Ordinary's interlocutor contained this *ratio decidendi*. In respect from the nature of the business carried on by the father, the defr., being that of bleaching, drying, and dressing of cloth, the child in question will be fit for being employed in certain branches of it by the time he arrives at the age of seven years.' It is, however, to be remarked that the Court disapproved of this observation as a ground of decision, and that therefore it had no influence whatever on their

judgment. If this disapproval went upon the ground that, as the father could give employment in his trade, therefore the duration of the aliment should be restricted to seven years, it is quite an intelligible ground of judgment, because at the end of the seven years the father might not have given the child such employment. But, if it be held to go the length of saying that it is not relevant to take into consideration the capability of a child obtaining employment in any trade, it is a ground of judgment which cannot be followed. Every trade and occupation in Renfrewshire is shut against such a child, except herding, of which there is little or none in that county, and the vagrant life of selling penny newspapers at the railway stations, in regard to which, moreover, the station-masters limit the number of candidates for public patronage. Further, the provision of the Education (Scotland) Act, 35 & 36 Vict. cap. 62, sec. 69, *et. seq.*, cannot be overlooked. It requires the parent of children, under penalties, to provide elementary education to his children under 13 years of age—implying that up to that period the whole time of the child cannot be allowed to be occupied in earning its own subsistence. Therefore, while not questioning the propriety of a rule that may have been quite just under a different state of the law, and in accordance with different views, as to the upbringing of children of tender years, the Sheriff now thinks that that rule should no longer be followed, and that in all ordinary cases the duration of aliment should be fixed in the case of boys up to ten years, in the same way as to girls, under the usual reservation of a right to apply, in special circumstances, for a further extension of the period. With regard to the amount of aliment to be allowed, it is quite clear that no general rule can be laid down. Reference must be had in deciding this question to the peculiar circumstances of the locality in which the pursuer is resident. A shilling in Unst is of far more value than the same coin in Paisley, and therefore, a rule that may be a good one for one county would be inequitable as applied to another. In the performance of their duty of deciding upon the complaints of inadequate relief by paupers, the Board of Supervision have always taken into consideration the mode and means of livelihood of the people of the district from which the complaint comes; and the Sheriff thinks that this would be a legitimate consideration in disposing of the question as to the amount of aliment in a filiation cause. The wages of all workmen have risen very much of recent years, and the price of articles of food has also gone up to nearly double what it was twenty years ago. Children's diet, and amongst others milk, has followed in this respect the prices in regard to other provisions: and unless one is tied down by some absolute law to 2s. 6d. a week, it is proper now to revise the scale. But neither by statute nor binding decisions is any such absolute rule recognised. In 1782 £10 a year was allowed for a girl (*Glendinning v. Fust*, Mor. 445). In the same year £8, 6s. 8d. was allowed for a boy (*Paterson v. Speirs*, Mor. 445). In *Arnott v. Thomson*, 25th February 1826, aliment for a boy was allowed at the rate of £7, 7s. for the first year, and £6, 6s. for subsequent years; and in *Patrick v. Goodwyn*, 8 D. 138, one of the judges thought £7 too high to be paid for a weaver's boy, he having an income of only £30 a year, but the Court allowed it. Two of the three cases go much further than the Sheriff thinks it necessary to do, and what he proposes to give is 3s. a week, or £7, 16s. a year. Of course this cannot be adopted as a general rule. The circumstances of the father may be such that he cannot afford to pay this money without starving legitimate issue that he may have; other burdens may also lie upon him—such as the support of a mother, which may render him unable to pay 3s. a week. Then, too, the character of the woman must be taken into consideration. It is not uncommon for a woman to make a trade of getting children with a view of thereby securing from the fathers or the Parochial Board a comfortable subsistence. She receives contributions from the different fathers secretly, and then applies for parochial relief, and the only means that the Parochial Board has to check this is to refuse out-door relief to any woman whose ground of pauperism solely is that she is burdened with bastard children. The poorhouse test has been found very effectual in checking this trade. In the present case the pursuer has had five illegitimate children, but they have

been all to one man, with whom she has lived for several years, and she cannot be held as coming within the description of the class referred to. In coming to a decision in this matter, the provision of the Education Act, sec. 69, requiring parents to provide elementary education for children between five and thirteen years of age, cannot be overlooked. No doubt that obligation existed before the Education Act, but the law could not before that Act enforce it. And the expense of education does not seem to have been taken into consideration (except in the case of *Lamb v. Paterson*, 5 D. p. 248) as an element in determining the amount to be paid weekly by the father of a bastard child to its mother. It seems, however, to be a legitimate element, now that education is made compulsory upon the parents of all children, whether legitimate or illegitimate; but the Sheriff is not prepared, without further consideration and consultation with his brethren, to say to what extent it should be admitted. There is one other point which may here be noticed, and that is, that the wealth or rank of the father cannot be taken into account as a ground for giving more than the ordinary sum. Poverty or weakness is a reason for *diminishing* it, but wealth on the father's part is not a reason for increasing it. It was determined by the House of Lords, in the case of *Maule v. Maule*, 1 Wilson & Shaw, p. 266, that the legitimate son of a wealthy father, unable to support himself by any trade or profession, is entitled to claim as aliment from his father only '*support beyond want*, and all that is beyond that is left to paternal affection.' This doctrine is clearly applicable to the case of an illegitimate child. It seems to have been forgotten in the case of *Lamb v. Pattison*, where one of the judges is reported to have said (15 Jur., p. 82), 'Looking to all the circumstances, and considering that this is not one of the poorest cases, where the child is merely to be kept alive, I don't think the charges more than reasonable.' The Court here decreed for aliment of a boy at the rate of £12 per annum for board, £3 per annum for clothing, and £50 for school fees, and school books, and medical attendance. The case stands alone since the decision of the House of Lords in the case of *Maule*, in taking into consideration the father's wealth as a reason for giving a large sum to the mother. The case of *Maule* does not seem to have been quoted to the Court. III.—The same considerations that induced the Sheriff to increase the aliment, lead him also to increase the sum of inlying expenses. Much larger sums have been given by the Supreme Court. Thus, in the case of *Arnott v. Thomson* above mentioned, where the point was distinctly raised, £4, 4s. was allowed. Even in 1765 £3 was allowed for inlying expenses, *Shotts v. Donald*, Mor. 442. Therefore the Sheriff keeps within the decided cases in increasing the inlying charges from £1, 10s. to £2, 2s."

[We understand that in some recent cases of the ordinary kind in the Sheriff Court of Glasgow, aliment has been granted at the rate of £8 per annum, and a larger sum has been given for inlying expenses than was given formerly.]

# THE JOURNAL OF JURISPRUDENCE.

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## RECONVENTION.

"JURISDICTION by reconvention is undoubtedly recognised by our law."<sup>1</sup> Although this statement cannot now be called in question, looking to comparatively recent decisions, yet the extent of the doctrine, and the precise circumstances under which the plea of reconvention can be raised, may still be said to be matters of doubt and some difficulty. The doctrine is founded, as is well known, upon the civil law, but the views of our own institutional writers do not assist us to define its place in the law of Scotland, it being indeed quite recently maintained that none of these writers recognised reconvention as a distinct ground of jurisdiction at all. Stair is certainly silent. Erskine, who devotes more than one paragraph to the subject of civil jurisdiction, ignores reconvention. The term itself is found in Bankton,<sup>2</sup> but in such a connection as not to throw much, if any, light upon the question. He is dealing with the necessity for a factor or cautioner in suits raised by foreigners, and adds, "Such factor is likewise bound, for the same reason, to find caution to answer the defender's claim in a reconvention or counter action."

These authors lived, it is true, before the time when dealings between Scotchmen and foreigners had become common, and questions were beginning to arise out of them. At the same time they do contemplate the possibility of lawsuits brought by or against foreigners, and their silence upon the subject of reconvention is therefore curious. It is surely very remarkable, for example, that Lord Kames, in his tract upon Courts, should find no place for this doctrine.

But, it has been argued, that by reconvention we just carry out this well-known principle of law, that where a foreigner has property within the jurisdiction of our Courts, he may be sued in those Courts. The pursuer, in coming into Court, admits that he

<sup>1</sup> Lord Ordinary (Kinloch) in *Thompson v. Whitehead*.  
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<sup>2</sup> iv. 23, 15.  
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has property in this country, and seeks the aid of our Courts in securing it, and hence arises a right to raise the *actio reconventionis*. But if this theory be true, reconvention has been most improperly restricted in practice; for the possession of property in Scotland renders the owner liable to actions at the instance of any party domiciled here, while it is beyond all dispute that reconvention is a plea open only to the defender in the original action.

Nor can it be said that the foreign pursuer has prorogated the jurisdiction of our Courts, since he was compelled by the very circumstances of the case to bring his action here. It would rather appear therefore that reconvention as a ground of jurisdiction is sufficiently distinct to have deserved special notice by our authorities.

But, in whatever way the doctrine crept into the Law of Scotland, it can hardly be called a novelty. The oldest case bearing upon the subject seems to be that of *Kirkhead v. Nairne* (9th Feb. 1628, M. 4839); in which it was held that the procurator for a foreigner pursuing here was not bound to find caution in an action of reconvention which the defender *intended* to raise. The report is short and unsatisfactory. It would rather appear to be the opinion of the reporter (Durie) that the defenders' action should have been directed against the procurator, and not his constituent. The curious case of *Vans v. Sandilands and others* (18th Nov. 1675, M. 4840), which has been cited as an authority upon the subject, is perhaps not of much weight. A Scotchman, named Martin, sued by foreigners and their mandatory, was sent to the Tolbooth of Edinburgh by the Court of Session because he had failed to find caution. From this prison he made his escape, and as the magistrates or keeper of the Tolbooth might have incurred liability, an action was raised by the latter to have it found that this escape was not due to any carelessness upon his part. To this action the mandatory alone was cited. He urged that he had only power to pursue Martin, and that the foreigners themselves should have been called as parties. The case seems to have excited no little discussion, and the Lords did "much reason amongst themselves," but at last by a majority they allowed the jailor's case to go to proof. Probably the argument which prevailed was, that "this escape being accidental, and such as both the town of Edinburgh and the Lords of Session were concerned in, it ought to have an immediate trial." The case does not throw much light upon the subject, because, although the competency and even the propriety of citing the foreigners appears to have been admitted, the circumstances were very peculiar, and it was absolutely necessary that this *actio reconventionis* should proceed in Edinburgh. The whole subject-matter of it was a mere incident in the original action. If these cases are of any weight they go to establish the liability of a mandatory acting for a foreigner, to defend actions brought in our courts against the latter.

In the case of *Ashton, Hodgson & Co. v. Macrill* (1775, M. 4835), the question of reconvention was again raised, but it does not appear from the decision that jurisdiction was sustained upon this ground. For the pursuers had used arrestments, and they only pleaded reconvention in answer to the objection that their arrestment was invalid. The grounds of judgment are not given. Reconvention as a ground of jurisdiction seems, however, to have been freely admitted. In the case of *White v. Spottiswoode* (30th June 1846, 8 D. 952), although the action did not rest upon the doctrine of reconvention, it formed a plea for the pursuer, and was recognised by the bench as a ground of jurisdiction even in proceedings before the inferior Courts. The later case of *Ord v. Barton* (22nd Jan. 1847, 9 D. 541) brought up this subject directly. In that case a domiciled Englishman had claimed in a Scotch sequestration. The trustee upon the estate brought an action against him for the purpose of having an alleged illegal preference, which the Englishman held, reduced. To this action he pleaded that there was no jurisdiction. The Inner House, affirming the judgment of the Lord Ordinary (Ivory), held that there clearly was jurisdiction. It is to be observed that in this case the circumstances afforded a strong ground in equity for the plea of reconvention. As Lord Moncreiff observed, "the defender is a claimant in a Scotch sequestration, and he must therefore take from us the whole law of bankruptcy which may bear upon his claim." The judgments in this case do not throw much light upon the doctrine, but they settle two points relating to it. It was pleaded that the conclusions of the trustee's action went beyond the extent of the fund available for satisfaction of the defenders' claims. But, as Lord Justice Clerk Hope remarked, "the extent of the fund is not the measure of the reconvention, nor is this the principle on which it is founded." It also seems to have been decided by this case that where reconvention is the ground of jurisdiction, it is unnecessary to set it forth in the summons.

Two cases of later date were decided by Lord Rutherford, and do not seem to have been brought before the Inner House. In the first of these cases, that of *M'Ewan's Trustees v. Robertson* (9th March 1852, 15 D. 265), the defender was a foreigner, who had been sequestrated here, but discharged under an arrangement. The pursuers, his creditors, raised the action for payment of a composition due to them, and pleaded reconvention in respect of the bankruptcy proceedings. In his note the Lord Ordinary says: "The present case, in so far as it depends upon reconvention, comes simply to this, whether a foreigner, having carried on business in Scotland, and obtained a sequestration there, and having afterwards abandoned the country, and being no longer subject to the jurisdiction of its courts, may be sued by a party given up as his creditors in the sequestration simply on the ground that he had been sequestrated, and discharged under sequestration, and that during the



took place. Immediately thereafter the master of this ship raised a counter-action against the arresters. To the first action there was a plea of no jurisdiction. There being some doubt as to the validity of the arrestments, the Court were called upon to consider whether or not reconvention could be pleaded. Lord Deas remarked, "There is no charm about the word 'reconvention,' as compared with 'convention,' so as to entitle you to say that you must always have the *actio conventionis* before you can have the *actio reconventionis* as a basis for founding jurisdiction. The material thing in my opinion here is, that both parties come forward together asking the Court to try the same question arising between them in the same capacities, and that to entertain the one action and not the other would defeat the very purpose of even-handed justice for which the doctrine of reconvention was established." On the other hand, Lord Ardmillan held that "in a cause in which that plea is maintained the reconvention ought always to succeed, and not to precede the cause out of which it arises." In this particular case the two actions were counter claims for damages arising out of the same collision.

The doctrine of reconvention seems to have been last discussed in the case of *Longworth v. Yelverton*, Nov. 5, 1868, 7 Macph. 70, the latest, and it may be presumed final stage of the great Yelverton cause. It was raised for the purpose of reducing the judgments pronounced in the former actions once depending here between the pursuer and defender, and a plea of reconvention was attempted to be set up to meet that of no jurisdiction upon the part of the defender. The question therefore came to be, Is it necessary that the *actio conventionis* should be a depending process, or is the fact that it once existed sufficient? Here, again, there was a difference of opinion; for while the majority of the Court adopted the view of Lord Rutherford, in the case of *M'Ewan's Trustees*, and repelled the plea of reconvention, Lord Deas remarked that "the doctrine of reconvention proceeds upon equitable principles, and I do not think there is sufficient authority for holding that these principles will never apply unless there is a depending action in Court." In his Lordship's opinion, the case of *Morison* last quoted decides the contrary.

Such is the case law upon this rather curious subject. It cannot be said to be quite satisfactory, but it is fortunate that, as other means of securing jurisdiction are usually to be found, Scotchmen do not seem to have been often compelled to take refuge in the uncertain plea of reconvention.

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#### THE JUDICIAL INVESTIGATION OF TRUTH.

AN interesting article on this subject appeared in the last number of the *Quarterly Review*. The writer begins by combating the idea that it is to lawyers we must trust for the attainment of law reform. "No construction or reconstruction of a system of law can ever be a

real success without the co-operation of minds free from the trammels of professional habits of thought. A professional class (as a class) never is and never can be philosophical, because it always is and always must be the slave of custom. If the administration of justice is ever to be based upon a sound philosophy, the impulse must be given in the main by a strong and sustained blast of lay common sense." A blast of lay common sense is a healthy thing for the law as it is for the church. But it cannot be denied that it is lawyers who have executed the work of law reform, and a good part of the impulse has come from them also; and we think that it is to them that the public must continue to trust for carrying out this work. The writer does not indeed say anything to the contrary, but his language might possibly be misunderstood by laymen who, without requisite knowledge, are anxious to signalize themselves as law reformers. Let them stick to their "blast." The reviewer then considers what it is that the lay mind can contribute to the problem of judicial administration. To answer that question it is necessary to consider the end and object of every practical system of law. To make it perfect these conditions must be satisfied. The law must be (1) just; (2) certain; (3) living and growing in order that it may accommodate itself to the growing wants of a living society; (4) must be applied to every particular case with the minimum of error, (5) of delay, (6) of expense. It is with the last three conditions that the writer deals.

After pointing out that it is to errors in fact, not to errors in law, that miscarriages of justice are mainly due, that the problem which really tries judges in their daily work is the investigation of facts, and that the difficulty is largely due to the imperfection of the methods which have been elaborated for the purpose, he adds that while it may at first sight appear that the matter of forensic procedure might of all departments of law reform be safely left to professional men, "yet it is precisely on this side of the problem that the necessity for lay assistance is most keenly felt. There are principles of procedure no less than principles of law; and no one, perhaps, is more in danger of losing sight of sound methods of investigating truth than the lawyer, who has spent his life in investigating it by one—and that perhaps a very defective—method. The skilled advocate is prone to forget the real end of judicial procedure, while he is constantly increasing his power of dealing successfully with the procedure which he finds in operation. English experience affords a singular illustration of this propensity, which can be matched in no other country. We have for some centuries lived under the jurisdiction of two sets of tribunals, working with two methods of procedure about as widely sundered as can possibly be conceived. Each, as may be supposed, has its strong and its weak points, and yet, such is the force of professional prejudice, it is quite an exception to find a lawyer who can see anything worthy of imitation in the method of the tribunals before which he has

not practised. Each man seems conscientiously to believe that what he has been accustomed to is dictated by the eternal fitness of things, and he never dreams of going back to first principles, and asking himself what are the avowed objects of every system of procedure, and how far his favourite machinery adapts itself to the great end in view—the judicial investigation of truth.”

“Keeping ourselves strictly within what we have defined as the province of lay thought, let us inquire whether the philosophy of common sense will not supply a few landmarks, which even the most experienced lawyers may wisely take note of. The first remark that the subject suggests is, that a lawsuit is not a game of whist. This may seem too obvious to be worthy of special mention; but no one can go far in the inquiry we have in hand without discovering that the ideas of lawyers are almost invariably built, however unconsciously, upon the opposite assumption.

“A few words are needed to explain this singular phenomenon. The object kept in view by those who frame laws for whist, is to make victory depend not simply on the strength of the hands that may be dealt, but in as great a measure as possible upon the skill of the players. If this were not done, the interest of the game would be lost. The rules are consequently framed with this express object, and one of the most essential is that each player shall be at liberty to conceal his hand from his opponents. If the cards were displayed, it would be easy in almost every case to count the honours and the tricks in each hand, and no scope would be given for retrieving a weak hand by superior play.

“The object in view in framing the law of forensic procedure is, or ought to be, exactly the reverse. Whatever the parties may wish, the desire of the Court must be that the side with the stronger hand—that is the side on which the merits preponderate—should invariably win. The primary aim must consequently be to eliminate as far as practicable the influence of professional skill, and to insure the verdict for the right side, however superior the tactics of the adversary may be. Probably no advocate, however much he may enjoy forensic triumphs, would in terms assert that the rules of law, like the rules of whist, should reward professional skill by making victory largely dependent upon it. But certainly there is no advocate of any eminence who could not tell how in unnumbered cases he had been successful, because his pleadings were better framed, his evidence more judiciously marshalled, his cross-examination more effectively conducted, or his arguments better adapted to the mind of the Judge, or the prejudices of the Jury, than those of his adversary. Under any system superior skill will inevitably tend to influence the result of a legal contest; but it makes all the difference in the world whether this is regarded as an evil to be brought down to the smallest possible dimensions, or as a legitimate incident of the game on which the issue may rightfully be made to depend.”

Starting from the principle that the merits of the case should prevail over technical skill, the reviewer lays down some maxims which are corollaries of the proposition, the first of which is, that "Every suitor should be compelled to show his hand at the earliest possible stage of the contest," and he gives some examples of the way in which this maxim is violated in the English law, and of "the extent to which, by crippling the preliminary process of discovery, English procedure tends to convert an action at law into a game of skill." Take this example. "A man is in possession of an estate which he has enjoyed for many years. Suddenly he is served with a writ of ejectment. The plaintiff claims the estate as his own. The possessor desires to know what the meaning of the demand is. 'By what title,' he asks, 'do you insist on turning me out of my property?' 'You will hear in good time,' says the plaintiff. 'Only come into Court with all your deeds, and all your witnesses, to answer any case that I may set up, and if you have any right to remain in possession you will have a verdict in your favour.' 'But,' says the possessor, 'I do not know what your claim is based upon. Are you going to deny that I am my father's son, and must I be ready to prove that? Or do you say that the deed under which my father entered is a forgery? Or what other claim have you to my estate? I insist upon you telling me what story it is that you trumped up, in order that when you attempt to prove it, I may be ready with counter evidence, and I shall ask leave of the Judge to question you on the subject.' Leave accordingly is asked, and again the Judge is forced solemnly to reply, 'I cannot allow the question; what the plaintiff means or hopes to prove is his case, and there is a rule of law which says that you cannot compel a litigant to make such a discovery as you are asking of his own case until the time comes for going into evidence. You must prepare yourself to meet whatever he may prove, and you must not ask him to tell you beforehand what it is likely to be.' 'But it is a great hardship on me,' says the possessor, 'to come into Court to fight against an enemy who shrouds himself in darkness.' 'That is so, no doubt,' the Judge must reply, 'but I cannot allow your question. There is a rule of law to the contrary. The plaintiff cannot be compelled to show his hand before the trial.'" There are defects in our Scottish procedure, but we are not quite so bad as all this.

The second maxim is, "Let the plaintiff state the facts on which he grounds his complaint, and then let the defendant state the facts on which he relies for his defence, in plain concise English, unfettered by any technical rules." Then the history of the methods of "open pleading" and "special pleading" are briefly referred to, and it is shown how the latter "broke down, because it needed intellectual giants to work it."

These two principles of Full Discovery and Untechnical Plead-

ing are the great principles for which the reviewer contends. Taking these for granted, he considers next—elaborately and with minute reference to the Judicature Act of last year and the new Rules of Court in England—before what tribunals and by what methods disputed questions are to be tried.

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### LIABILITY OF LAW AGENTS.

IN the case of *Dorward v. A. B.*, which was reported in the last number of the *Journal*, there was raised an interesting question relating to the liability of law agents.

An agent had been employed to conduct a case in which his client was the pursuer, in the Sheriff Court of Cupar, and had conducted it up to the time when an adverse judgment was given by the Sheriff-Substitute. He failed however to give notice of this judgment to his client, who did not live in Cupar, and as the interlocutor was not appealed against, it became final. The action to which we now refer was raised shortly afterwards against the agent, and was grounded upon this culpable neglect of professional duty, and concluded *inter alia* for payment of the sum sued for in the original action. It was obvious that in order to succeed two things must be established by the pursuer—*first*, the neglect on the part of the defender; *second*, loss arising from the neglect. As to the first, the pursuer seems to have had little difficulty in satisfying both Sheriff-Substitute and Sheriff that the defender had failed in his duty. But, as the former judge remarked, “a further question remains.” It was easy to show that the right of appeal had been lost through the negligence of the defender. For the pursuer had naturally relied upon his agent who was in Cupar, and who was presumed to be looking after his interests there. He was not aware of there being any judgment against which to appeal, until an appeal became incompetent. But to show this was not enough. How is a right of appeal to be estimated in claiming damages upon the ground of pecuniary loss? A successful appeal no doubt would have given the pursuer what he sued for, and what in the present case he demanded from his agent. But an unsuccessful appeal would have involved him in loss. The neglect of his agent, highly improper as it was, may have resulted in actual gain to the client. It may have just put a stop at once to what otherwise would have been an expensive and fruitless course of litigation. The case came in the first instance to depend before the Sheriff-Substitute, who was thus placed in a somewhat awkward position. It was contended that, as the pursuer had a reasonable chance of succeeding had an appeal been taken, he was entitled to recover damages. But the Sheriff-Substitute had already decided against the pursuer in the original action, and it was difficult for him to

look upon the appeal as likely to have proved successful. What he did, as appears from the note, was to go over the ground of his former judgment. He says—"He has carefully reconsidered his judgment in the former case. If he had been satisfied now that that judgment was erroneous, he might have been bound to proceed upon that footing, and to hold that an appeal should have led to a reversal; but considering the judgment as candidly as he can, he still thinks it is right." Accordingly he found "That the pursuer has not established that, by the failure of the defender to let him know the result of the case, any loss has accrued to him, inasmuch as he has failed to prove that the appeal would have been likely to result in a decision in his favour."

The Sheriff, although recalling the interlocutor of his Substitute, and finding some damages due, agreed with him in thinking that it had not been proved that the appeal would have been beneficial to the pursuer, and in refusing to award damages for the loss of the right of appeal. But the ground upon which he went was somewhat different. While the Sheriff-Substitute reviewed the original action, and satisfied himself in this way that an appeal would have entailed loss, not gain, to the pursuer, the Sheriff really refused to consider the original action at all. He says, "No doubt the pursuer has failed to prove that an appeal would have been of any benefit to him. Indeed the Sheriff thinks it would have been impossible for the pursuer to do this. It cannot be determined with certainty whether the pursuer's claim against Sir John Bethune is well or ill founded, until it is submitted to the highest tribunal of the country. The Sheriff has not considered whether, in the case at the pursuer's instance against Sir John Bethune, he would have arrived at a different conclusion from the Sheriff-Substitute or not. He has read the proceedings in that process, which have been produced in the present case, and he observes that the Sheriff-Substitute, in disposing of it, states that the question between the pursuer and Sir John was one of difficulty."

The Sheriff-Substitute in substance said to the pursuer,—“You have lost nothing and therefore can recover nothing,” while the Sheriff's answer was,—“It is not *proved* that you have lost anything, and, as such proof is impossible, therefore I can give you nothing.” We humbly think that the argument of the Sheriff does at least answer that of the Sheriff-Substitute. The plan of the former was to go into the merits of, and decide over again, the first action. But the Sheriff saw, and we think rightly, a difficulty in taking such a course. The Sheriff-Substitute could not possibly tell what would have been the result in any other Court but his own. The pursuer had his chance of a reversal until defeated in “the highest tribunal of the country.” The Sheriff-Substitute's opinion upon the merits had been given already in deciding the original action, and what the pursuer did was not to ask him to reconsider his judgment, but to award him damages against a man who had

deprived him of his legal right of appeal and reasonable chance of a reversal. The Sheriff, on the other hand, refused to go into the merits of the first action, and seems to have held himself precluded from doing so.

Now we think that this case fairly raises the question whether or not in such circumstances all that the pursuer has got to do is to establish the reasonable nature of his original claim, and to throw upon the defender the *onus* of establishing that the neglect of professional duty upon his part cannot *possibly* have injured his client. There was an uncertainty about the result of the appeal, had it been taken, but was the defender, who had been beyond all doubt guilty of neglect, to gain because of this uncertainty? was in fact the pursuer even bound to prove that the appeal would have been likely to result in his favour? or was not the defender rather bound to prove that success was impossible? It is thought, with all respect to the learned and able Sheriffs who have thought otherwise, that there is authority in the law of Scotland for answering their questions in the affirmative.

It will be borne in mind that we are here dealing with a case in which the question of what amount of discretion must be allowed to an agent is really entirely excluded. An agent may be entitled to throw up a case after having obtained a judgment of the Sheriff-Substitute, and to decline to take an appeal; but he is of course bound to give his client an opportunity of carrying on that appeal if so advised. Nor is this a case of ignorance involving the question of the degree of professional skill required for the exercise of the profession. It is one simply of negligence, and that of a gross kind, as will appear from a perusal of the notes appended to the judgments.

For a full reference to all the cases bearing upon this subject, both English and Scotch reference must be had to the chapter upon "Professional liabilities" in Mr. Begg's treatise, in which will be found a clear statement of the law. We can refer only to one or two cases decided in this country which seem to relate specially to the question above stated. In the case of *Chatto & Co. v. Marshall*, 17th Jan. 1811, the party guilty of neglect was a messenger at arms, who had failed to execute a poinding, and the action was raised against him and his cautioners for the full amount of the debt. In this action the pursuers were successful, although it was pleaded that under the circumstances a poinding was impossible, and must have failed if attempted. In giving judgment, Lord Craig observed that "it was very inexpedient to permit an investigation into the amount of the damage sustained on account of the great uncertainty which attended such inquiries;" and the Lord President (Blair) said, "one thing seems to be established, that the creditor, employer of the messenger, is not bound to prove the *quantum* of the damage." In short, the *possibility* of the debt being recovered from the execution of the poinding seems to have been a

sufficient ground, in their opinion, for giving judgment against the negligent messenger. There can be no difference in principle between the case of a messenger at arms and a law agent where negligence is the charge made against them, seeing that the element of discretion is quite excluded. But in the case of *Lillie v. Macdonald*, 13th Dec. 1816, the offender Macdonald was a law agent. It may be sufficient to quote the rubric of that case, which is as follows: "A bond and assignation having been granted to a party, it was found that his agent, being unable to prove that he had duly intimated the assignation, was liable for the amount, although the assignation was made twenty-five years before action was raised against the agent, and although it appeared that the debt assigned was compensated at the time of the assignation." It will be observed that the agent was found liable in the *amount of the bond*, although in substance a defence similar to that raised in Dorward's case was made. For it was observed from the bench that, "as to the defence that the bond was compensated so that intimation would not have secured relief from the bond assigned, Mr Macdonald was bound to have intimated *valiat quantum*." Perhaps the most important case is a more recent one, that of *Ross or Urquhart v. Grigor*, June 12, 1857, 19 D. 853. That case was decided in favour of the agent, the Court being of opinion that the neglect alleged (failing to give notice of an interlocutor allowing proof) had not been proved. So that the present question did not affect the ground of decision. But it is dealt with by the judges, the effect of their observations being well expressed by the rubric, when it says that, assuming the action had been lost by the negligence of the agent, "the conclusions of the action so lost would not necessarily be the measure of the damage, but the Court would inquire into the soundness of the claim." This opinion may be said to be in advance of what was held in the previous cases; an examination of the case will show, however, it is thought, that if the pursuer sets forth a reasonable ground for the action, this will warrant a claim against his agent by whose negligence that action has suffered. All that the Court appear to stipulate for is a right to inquire into the facts and circumstances. The case of *Davidson v. Mackenzie*, 20th Dec. 1853, 19 D. 227, may be also referred to for the opinions of Lords Colonsay and Curriehill. At the same time, one cannot help seeing difficulties in the way of giving decree against the agent for the full sum sued for in the original action, difficulties which the learned Sheriff here found it impossible to get over.

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## REMARKS ON RECENT ENGLISH CASES.

*Passengers' Luggage.*—On this subject—a subject of considerable importance to people who travel by rail, that is to say, to everybody—two recent cases are worthy of note, the one in Queen's Bench, the other in the Exchequer Chamber, in error from the Court of Exchequer. One might fancy that as the conveyance of the personal luggage of a traveller, for which he pays no separate charge, is accessory to the conveyance of the passenger himself, the liability of the carrier for the safe conveyance of the passenger's luggage should not be more extensive than his liability for the safe conveyance of the passenger. But as Chief-Justice Cockburn has said, "The law is now too firmly settled to admit of being shaken that the liability of common carriers in respect of articles carried as passengers' luggage is that of carriers of goods as distinguished from that of carriers of passengers, unless indeed where the passenger himself takes the personal charge of them, in which case other considerations arise." *Macrow v. Great Western Railway Company*, 6 L. R., Q. B. 612. In *Agrell v. London and North-Western Railway Company*, in the Exchequer Chamber, Feb. 12, 1875, the question arose, as it must often arise in cases of this class, whether the luggage had been delivered to the company. In this case the plaintiff, who was going to Hull, gave his portmanteau to the railway porter, who placed it on the platform, near the place where luggage was usually placed, which was to be despatched to the plaintiff's destination. The plaintiff himself affixed a label of address. This was half an hour before the train started, and when it did start, it was discovered that the luggage was off. The Court of Exchequer Chamber held that the luggage was not delivered to the company; it was given to the company's servant to await the traveller's further orders. Certainly, the traveller had not lost the immediate control of the luggage. But when a passenger takes the luggage into the carriage with him, he still preserves the immediate control over it; yet the company is liable for the loss, unless the traveller has been more than usually negligent. *Campbell v. Caledonian Railway Company*, 14 D. 806. *Le Conteur v. South-Western Railway Company*, 35 L. J., Q. B. 40. From this case it may be seen that the case of passengers' luggage is, according to the decision of the Court as it is in fact, very different from the case of ordinary goods. If goods had been delivered to a servant of the railway company, the company would have been liable if the goods were thereafter lost.

In *Kent v. Midland Railway Company*, 43 L. J. Reports, Q. B. 18, the question was whether the case fell within the condition which had been imposed in the passenger's ticket. The condition was that the company was not to be responsible for loss arising off its own line. The station at Birmingham belongs to the London and Western Railway Company, but the Midland Company have the use of

it, and are entitled to the services of the porters. On arrival at Birmingham, the plaintiff's luggage was taken by a porter, who said he would meet him with the luggage at the train for Chester. When the plaintiff came to that train the porter was on the platform with the luggage. It was never seen afterwards. The Court held that according to the true construction of the condition the luggage could not be said to be off the company's line until it was out of their custody, and into the custody of some person responsible for the loss, and that there was no evidence that the London and North-Western Company ever took the luggage into their custody. It was not necessary to decide whether the traveller was bound by the condition, which he had not read; or whether the condition was reasonable.

*Master and Servant—Pilot.*—In the case of *Smith's Executrix v. Steele* (23 Weekly Reports, 389), the question was whether a shipowner is responsible for injuries caused to a pilot by the negligence of the crew. The voyage had not actually commenced, but the pilot was on board in the way of his occupation giving directions to the crew. The Court held that he was clearly on board as a pilot, and on the same terms as to rights and to risks, whatever these might be, as if the voyage had actually commenced. By the Merchant Shipping Act, 17 & 18 Vict. c. 104, the pilot is subject to a penalty if he refuses to take charge of a ship (sec. 365), and the owner is bound under a penalty to employ a pilot (sec. 353). The Court held that the shipowner was liable. The question really came to this, whether there was an implied contract between the pilot and the owner that the former should take the risk of the negligence of the owner's servants. In *Wilson v. Merry & Cunningham*, Lord Cairns said that the master was not liable to the servant unless there was negligence on his part in that which he had contracted to do. He might contract to do the work himself; if he did not he was only responsible to the extent of appointing competent persons to do it. "A servant may choose for himself between serving a master who does and a master who does not attend in person to his business." In the present case the owner had certainly not contracted to do the work himself, or attend to it himself; and yet he was liable for the acts of the servants. There had been, properly speaking, no contract at all, the employment being compulsory on both sides. The pilot had not undertaken any risk arising from the negligence of the owner's servants. He could not choose, as Lord Cairns puts it, between entering into the employment of a master who did and entering into that of one who did not attend in person to his business.

The case was held to come under the principle of such cases as *Indermauer v. Dames*, L. R. 1, C. P. 274, affirmed in error, L. R. 2, C. P. 311. The pilot went upon the ship not as a "mere volunteer or licensee, or person whose employment is such that danger may be considered as bargained for, but upon business which concerned the owner, and upon his invitation express or implied."

*Secret Payment by one Contracting Party to Agent of the other Contracting Party.*—In the case of *Morison v. Thompson* (43 L. J. Reports, Q. B. 215), it was held that where an agent for a purchaser made an arrangement without his principal's sanction, whereby he received a profit out of the transaction in connection with his agency, his employer was entitled to claim the sum thus acquired. In that case the plaintiff authorized the defender to negotiate for the purchase of a particular steamship on the basis of an offer of £9000; but it was eventually sold for £9250. Prior to the sale an arrangement was made between the vendor and his broker, that if the latter sold the ship for more than £8500, the broker should have right to the overplus. The arrangement was known to the purchaser's agent, but not to the purchaser himself. It was arranged between the vendor's broker and the purchaser's agent that the latter should receive £225. On this becoming known to the purchaser he raised an action against his agent for the sum; and the jury found for the plaintiff. The Court of Queen's Bench sustained the verdict. The decision was in conformity with many previous authorities. The law on the subject is summed up thus in *Story on Agency*:—"It may be laid down as a general principle that in all cases where a person is, either actively or constructively, an agent for other persons, all profits or advantages made by him in the business beyond his ordinary compensation are to be for the benefit of his employer." In short, as it was put by Lord Ellenborough in an old case, "no man should be allowed to have an interest against his duty."

In the case of *Sorby v. Smith*, in the Court of Queen's Bench in February last, the question was raised whether a secret arrangement, by which an agent secured a profit, had not a still more important effect—whether it did not vitiate the contract. In that case the agent for the proprietrix of a colliery, with the knowledge of the principal, entered into a contract with another for the supply of waggons for the colliery. For this he received unknown to his principal £60. He also made a contract with the person who was to supply the waggons to supply coals to him for five years at the rate of six shillings and sixpence per ton. Coals rose to a much higher price, and implement of the contract was refused. The defence was that the agent had no authority to make such a contract, and that the proprietrix of the colliery was induced to enter into the agreement because of a fraudulent collusion between the plaintiff and her agent. At the trial Pollock, B., left it to the jury to say whether there had been a fraudulent and corrupt agreement, and directed the jury that they could not find for the owner of the colliery unless they held that the agent and the other party had entered into a fraudulent conspiracy for which they might have been indicted. The jury held that what had been done did not amount to fraud, so as to vitiate the contract. The Court of Queen's Bench, however, held the direction wrong. The question, as Cock-

burn, C.J., put it, was whether the operation of this secret profit was to exercise on the agent's mind an influence adverse to his employer's interest. If so, there was fraud, which vitiated the contract.

*Trade Mark.*—In *Smith v. Mason*, another of the endless and ever-varying trade mark cases was recently decided by Vice-Chancellor Hall. A person of the name of Smith patented a medicine which he called "Smith's Pectorine." Perhaps to make it more distinctive, he changed the name to "Pectorine." Shortly afterwards he found that another person was selling a medicine under the name of "Pectorine." An injunction being applied for, the defence was that the second "Pectorine" was composed of totally different ingredients from the first of the species. The Vice-Chancellor granted the injunction. The name "Pectorine" was purely a fanciful one. The name differed entirely from such a name as "Nourishing Stout." The case came under the same category as the "Eureka Shirt" case—a name which was found to be protected. *Ford v. Foster* (L. R. 7, Ch. 611). There is no monopoly in common words of the English language; there is in purely fanciful appellations.

*Tenant of Shootings.*—A somewhat curious question occurred in the case of *Gearns v. Baker*, March 24th. The plaintiff took a lease of a mansion-house and the exclusive right of shooting, coursing, and fishing over the estate. Soon after the lease was entered into a portion of the wood on the estate was put up to sale; and it was alleged by the plaintiff that if this sale were carried out, some five or six of the plantations on the estate would be destroyed, and consequently great injury would be done to the shootings because of the destruction of the covers for the pheasants. Vice-Chancellor Hall granted an injunction. The Lord Justices reversed. They held that there was nothing in the agreement depriving the owner of the estate of his proprietary right to manage his estate as he pleased. If the shooting tenant desired or required the proprietor's right to be restricted, there should have been a clause inserted in the agreement. It appears to us that the question depends on this other question, whether the cutting down of the timber was made in the ordinary agricultural occupation of the subjects. A tenant who takes the lease of shootings is certainly entitled to assume that the proprietor will not immediately set to work and cut down all the plantations which give cover to the game.

*Note.*—In our remarks in last number on the case of *Banks v. Crossland*, we were in error in stating that there was no Scotch case on the subject. There is a case, *Kershaw v. Mitchell*, March 16, 1872, 2 Cooper 206, where an entirely opposite decision from that of the English Judge's is arrived at. The case is not reported in the Session Cases, which occasionally reported *Judiciary*

cases, nor in the *Scottish Jurist*, which reported them regularly. We were in some degree misled by the judgment of the Sheriff-Substitute of Aberdeen, in the case of *Moir v. Shaw*, reported *ante*, vol. xviii. p. 614. Cases of that class frequently come before the learned Sheriff, and from the elaborate judgment he pronounced in *Moir's* case, it is evident that he had given special and continued attention to the subject. But there is no reference to the case of *Kershaw v. Mitchell*. Indeed, it is intimated that the only authority bearing on the subject is the English case of *Crane v. Powell*.

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### The Month.

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*Sir Charles Dilke and the Ballot Act.*—Last year we mentioned that Sir Charles Dilke had applied for a Commission or Select Committee to inquire into the working of the Ballot Act, and to report on what he regarded as its defects. The Government staved him off with the plea that it was better to wait for the result of the Election Petitions, when it would be known from the decisions of the Judges what interpretation was to be put on some ambiguous and disputable phrases in the Ballot Act. As it turned out, not very much information was obtained from this source. The only case of great importance was the Wigtown Burghs case, in which it was held by two Judges out of three who had to decide the case, that what the Act makes directory is imperative. Very recently Sir Charles Dilke renewed his application, and the application was refused on the ground that there were already a great many Committees sitting, inquiring into subjects of great public importance. There is to be no official inquiry, and there is to be no legislative action for the present; but it may be well for any one who has had experience in the working of the Act to offer such suggestions as his experience enables him to make, which may guide returning officers in the conduct of elections. During the debate on Sir Charles Dilke's motion, a speech was made by Mr. Mark J. Stewart, the member for the Wigtown Burghs, who complained very bitterly of the operation in his case of the Ballot Act. He had really a majority of votes at his first election. He was unseated, and had to stand another election. A second petition was brought against him. He succeeded on the second occasion. But on both occasions he ran the risk of losing his seat, simply because some papers were found to be unstamped. That was due, said the member for the Wigtown Burghs, to "the carelessness and indifference of the polling sheriffs." We have, and everybody has, the utmost sympathy with a gentleman who has had to bear the brunt of two elections and two election petitions. Such things are expensive luxuries. We understand all this and we make allowance for it. But when Mr. Stewart attributes his mishaps to the carelessness and indifference of the polling sheriffs, we have only to say that the state-

ment is unfair, is unjust, and is untrue. The presiding officers were not careless. They were not indifferent, except in the sense in which that term was used two centuries ago. There is, however, very little use in crying over spilt milk, however much you may sympathise with the individual whose property has been destroyed. And there is just as little use in a candidate and presiding officer firing long shots at each other, especially when the candidate has the advantage of being able to place his gun in position,—in such a vantage-ground as the House of Commons. The practical thing is to discover how the mishap arose, and how it may be avoided in time to come. These are the questions which sensible persons will put, and to which they will desire an answer. We believe the mishap as to the stamping of the papers was due to the inefficiency of the stamping instrument. At the first election some papers were found to be unstamped, and as to another it was a matter of doubt whether it had been stamped or not. At the second election, of course, every presiding officer was particularly careful to see that the same error did not occur again.

The stamp used was an *embossed* stamp. It is possible that in the course of two or three months the creases may have come out of the paper. But it is more likely that the stamp did not come properly down. When you poll some hundreds of people in the course of eight hours it is impossible to inspect each ballot paper before it is given to the voter. When an ink stamp is used, or a perforating stamp, which takes a piece out of the paper, the polling sheriff can see at once—cannot help seeing—whether the paper is or is not stamped. But with an embossed stamp, that cannot be seen without a careful inspection. No doubt, voters are to blame if they do not take care to see whether the stamp is impressed; but as a rule they do not. And it is, according to the terms of the Act, necessary that the voter should show the official mark on the back before putting his paper in the ballot box; but sometimes voters will place their paper in the ballot box before the presiding officer is able to stop them.

The lesson to be drawn is this, that the use of embossed stamping instruments should be discontinued.

*Sir Henry James's Returning Officers Bill.*—We are enabled to furnish our readers with the "Report of Committee of Sheriffs of Scotland on the Parliamentary Elections (Returning Officers) Bill 1875."

"Before making observations on the details of the Bill, we may state our general conclusion that the case of Scotland is not met by the present Bill, and that Scotland should be excluded from its operation, and if dealt with at all, should be so in a separate measure.

"We think, however, that legislation on this subject at present as regards Scotland is premature. From our experience of the working of the Ballot Act, we feel very sure that at any future General Election, and without any legislation, much expense,

which the peculiar circumstances and the novelty of procedure rendered inevitable at the Election of 1874, will not in Scotland recur.

"If, however, legislation is to take place now as regards Scotland, we are of opinion that it should be in the direction of providing that all contracts for services, or furnishings at an Election, should be made by the Sheriff-Clerk, subject always to the control and revision of the Sheriff, whose decision upon the amount to be charged and paid in respect of any such services or furnishings should be binding on all parties, and beyond appeal. It is not the wish of the Sheriffs to make any claim against Candidates for personal services at Elections: but there can be no difficulty in embodying our proposals in an Act applicable to Scotland,—a course which, we believe, would meet with general approval in Scotland.

"The present Bill (which in some particulars virtually repeals the Ballot Act) differs in some of its details from that of last year, but is still made applicable to Scotland.

"In Clause 2 the Candidates are still declared to be liable each for an equal share of the expenses; but the provision, which was in last year's Bill, for allowing by agreement higher charges than the Bill itself permitted, is left out.

"Clause 3 has been remodelled, and by the present Bill the Returning-Officer may, *if he think fit*, 'require security to be given for the charges which may become payable under the provisions of this Act in respect of any Election.'

"The maximum total amount of security which the Returning-Officer may require in respect of all the Candidates is given in Schedule 3; and it is provided in the relative clause that where security is required, it shall be apportioned and given as follows:—

"(1.) 'At the end of the two hours appointed for the Election, the Returning-Officer shall forthwith declare the number of the Candidates,' and if there are more nominated than vacancies to be filled up, 'shall apportion equally among them the total amount of the required security.'

"(2.) 'Within one hour after the end of the two hours aforesaid, security shall be given by, or in respect of, each Candidate then standing nominated for the amount so apportioned to him.'

"(3.) 'If in the case of any Candidate security is not given or tendered, as herein mentioned, he shall be deemed to be withdrawn, within the provisions of the Ballot Act 1872.'

"(4.) 'A tender of security in respect of a Candidate may be made by any person.'

"(5.) 'Security may be given by deposit of any legal tender, or of notes of any Bank being commonly current in the County or Borough for which the Election is held, or with the consent of the Returning Officer in any other manner.'

"(6.) 'The balance (if any) of a deposit beyond the amount to

which the Returning Officer is entitled in respect of any Candidate shall be repaid to the Person or Persons by whom the deposit was made.'”

“The third Schedule prescribes the maximum sums which may in each case be required to be deposited. These are regulated, according to the number of voters, from £150 in Counties and £100 in Boroughs of not more than 1000 Voters, up to £1200 in Counties, District Boroughs, and Boroughs where the Voters exceed 30,000.

“In uncontested Elections, the Deposit is not to exceed one-fifth of the amount for a contested election. The Bill leaves the requirement of Security, it will be seen, still optional, and it may also be doubted whether a mere tender of any Security made by any Person under head (4.) of the Clause, would not render the penal part of head (3.) nugatory.

“There is also a possibility of two or three or more of a number of Candidates nominated at the close of the first two hours not finding Security, and thus being retired, leaving the remaining Candidates to carry on a contested Election, for the expenses of which the Returning-Officer would have very meagre Security. We think that giving sufficient Security by deposit of money should be an absolute condition of Nomination; and that there should be no change of the law as to the joint and several liability of Candidates.

“Section 4 regulates the Taxation of the Returning Officer's Accounts in England and Ireland.

“Section 5 is a new clause directed entirely to the Taxation of Returning Officers' Accounts in Scotland.

“The framers of this clause have avoided the anomaly in the provision of last year's Bill of the Sheriff being made auditor of his own accounts; but the provisions in the present clause are open to objections still more grave and important.

“In this Bill the Sheriff-Court, having jurisdiction at the place of nomination, is still made the Taxing Court, but the clause provides that ‘the taxation and examination shall be performed by a person to be appointed from time to time by a Judge of the Court of Session, and such person shall, for the purposes of this section, have all the same powers as if he were Judge of the Sheriff-Court, and his determination shall have effect, and be enforced accordingly.’”

“The section goes on to provide that ‘a majority of the Judges of the Court of Session’ may, from time to time, make, vary, and revoke regulations for the appointment of ‘the persons’ aforesaid, for prescribing their duties, and fixing their remuneration.

“It is conceivable that in some very urgent circumstances, and for some very special reasons and purposes, a proposal to supersede temporarily in his own jurisdiction and Court a Judge supreme in that jurisdiction and Court, and whose right to act as Returning-Officer was recognised by Statute so long ago as 35 Geo. III., cap.



65, by appointing in his place another Judge, might be reasonably made and entertained ; but, surely, it is going rather beyond what is reasonable to propose to supersede the Sheriff in his own Court, where he sits by virtue of a commission under Her Majesty's own hand, *ad vitam aut culpam*, by 'a person' appointed by 'a Judge of the Court of Session,' and that for no other reason or purpose than the taxation of a few lawyers and tradesmen's accounts, which, having been contracted by the Sheriff acting under the full weight of his official responsibility, might with good reason be assumed not to have been either unnecessarily incurred, or extravagantly charged, or to require any taxation. We think this clause most objectionable ; and refer to our suggestions at the beginning of this report for what we think the simple remedy, so far as Scotland is concerned.

"The remaining clauses do not require any remarks.

"As regards Schedule I. in the present Bill, a little more liberality is shown than was the case last year. But the proposed allowances seem still insufficient, and, moreover, the peculiarities of the constituencies in Scotland, arising from their geographical position and the conformation of the country, have not been regarded in framing the Schedule.

"Thus, it is proposed to allow not more than three guineas to each Presiding Officer, one guinea to each Clerk at a polling station, and one guinea to each person employed in counting votes.

"In many, nay, in most Scotch counties and district burghs, these sums are not adequate payment for the duty done and time employed.

"In almost every case the Presiding Officer and Poll Clerks, and also possibly those employed in counting votes, will be occupied the better part, if not the whole, of two days, and the persons employed in counting votes should be thoroughly reliable persons, and may have to be brought from a distance.

"The Presiding Officers and Poll Clerks must, on the day before the Poll, appear before the Sheriff, and take the statutory declaration : the Presiding Officers must then receive their instructions from him, and the books, stamps, and ballot-boxes, &c. ; they must then travel to their respective stations, where they must take up their lodgings for the night, in order to be able to open the poll at 8 o'clock next morning : an allowance for two days in all such cases must be made, or fit persons for the work will not be obtained. But besides these, there are other cases in extensive Highland counties where a whole day will be occupied in travelling from the returning burgh to the polling station.

"The Schedule proposes, where notices relative to the Election are required to be published, to allow 'the necessary expenses not exceeding 10s.' At the last Glasgow Election the printing and posting up of the notice of the arrangements for the Election, containing the directions to voters, an imperative proceeding under the Ballot Act, Rules 9 and 10 and second Schedule, cost £60, 10s.

"Further, the provisions are inapplicable to the case of Orkney and Shetland, or the Western Islands, in order to manage which expenses must be incurred for steamers, &c.; and in Orkney and Shetland the poll is by law kept open for two days. The necessary expenses of publishing the Writ in these islands exceeded, at the two last Elections, three times the amount allowed in the Schedule of the Bill. In Inverness-shire at last Election a steamer was engaged conditionally to carry the stamps and ballot-boxes to and from Lochmaddy, in North Uist (where a polling-place was fixed), at a charge of £100; but the threatened contest did not take place. The Presiding Officer at that polling-place must travel from there to Inverness with the ballot-boxes, &c., involving the occupation of several days of his time, for which, under the Ballot Act, £3, 3s. *per day* was payable, but under this Bill a single sum of £3, 3s. is all that is allowed. This, although an extreme, is by no means a singular case. Indeed, in probably most of the county polling-places in Scotland, the Presiding Officer would inevitably be occupied two or more days.

"Even were these cases exceptional, it would be unreasonable to fix maximum charges without regard to them."

*The Language of Acts of Parliament.*—Mr. Forsyth, Q.C., the member for Marylebone, recently drew the attention of the House of Commons to the manner in which Acts of Parliament are drawn, and he urged the propriety of devising some means by which the wording of the Acts might be improved. The Attorney-General agreed with the learned member for Marylebone in thinking that there was room for improvement, and that there was a patent necessity for something being done, but he did not agree with Mr. Forsyth as to what that something was to be. Mr. Forsyth desired to have a permanent committee, assisted by a paid official, who should go over bills before they are finally passed, make their language grammatical and intelligible, render their provisions consistent *inter se*, and take care that the statute that is to be is in harmony with legislation that is. The Attorney-General declined to accede to the proposition of Mr. Forsyth. He preferred the appointment of a Select Committee of the House of Commons to inquire into the whole subject. The committee has now been appointed. It consists of nineteen members, including Mr. Lowe (and for such a purpose no better man could be selected); Mr. Forsyth; Sir John Karslake; Mr. Gregory, the solicitor; Mr. Rathbone, the member for Liverpool, who has given special attention to this subject; Mr. Walpole; and the Attorney-General. The rest are mostly padding.

Of a truth it is time that something should be done to make the provisions of Acts of Parliament consistent with each other and with previous legislation. Mr. Forsyth, in introducing his motion, said that "every one who is not a lawyer approaches the Statute Book with feelings of aversion and disgust, and turns from it as

from a chaotic wilderness, a labyrinth of strange phraseology and intricate construction." Every one who is not a lawyer does so, says Mr. Forsyth; but every one who *is* a lawyer turns from the study of the modern statutes with even a greater irritation,—the irritation that springs from an honest but futile attempt to understand that which is unintelligible, and to reconcile that which is irreconcilable. There are in this earth many things which it is difficult to understand, but of all sublunary matters which are difficult of interpretation we give the palm to Wills and to Acts of Parliament. A very amusing paper might be written (and why does not somebody do it?) illustrating the inconsistencies and absurdities that are to be found in our existing Acts of Parliament. One might refer, for example, to the Scotch Bankruptcy Act, the enacting sections of which refer to schedules which are not to be found in the Act; to the Salmon Fishery Act, which provides that a certain number of the Salmon Fishery Board shall be a *quorum*, if the Board consists of more than six, and a certain other number shall be a *quorum* if the Board consists of less than six, but forgets to mention what number is to be a *quorum* if the number happens to be exactly six. One of the most amusing cases is that in which the Act provides that half of the penalty shall go to the informer, and the penalty is fourteen years' transportation. Another amusing blunder occurs to us at this moment. In the Darlington Improvement Bill of 1872, it is said in the interpretative clause that the term "new building" means any building pulled or burned down to the ground. In America they are not much better off. One of the statutes of New York obviously omits the important word "not." Another statute passed two years ago, carefully amends a statute which happened to be beyond the reach of amending—having been repealed. In another American statute it is provided that a term of good behaviour of a convict shall be held a deduction from his term of imprisonment, except in the case where he is sentenced to imprisonment *for the term of his natural life*.

We have put Wills and Acts of Parliament on the same level as regards the difficulty of interpreting them. One would at first sight fancy that nothing could be easier than to draw one or the other. Yet the result proves that it is not easy. The will of so clear-headed a man as the late Lord Westbury has been the subject of dispute in the law courts for the last year or two. As to the framing of Acts of Parliament, hear what is said by the late John Austin, who himself had tried his hand at the craft, *crede experto*.

"I will venture to affirm that what is commonly called the *technical* part of legislation is incomparably more difficult than what may be styled the *ethical*. In other words, it is far easier to conceive justly what would be useful law, than so to construct that same law that it may accomplish the design of the law-giver.

"Accordingly, statutes made with great deliberation and by learned and

judicious lawyers, have been expressed so obscurely, or have been constructed so inaptly, that decisions interpreting the sense of their provisions, or supplying and correcting their provisions *ex ratione legis*, have been of necessity heaped upon them by the courts of justice. Such, for example, is the case with the Statute of Frauds, which was made by three of the wisest lawyers in the reign of Charles II., Sir M. Hale (if I remember right) being one of them."

In drawing the attention of the House of Commons to the subject, Mr. Forsyth mentioned three rules which Lord Brougham laid down as of paramount importance in the construction of Acts of Parliament. These were, that the Bill should be drawn with a full knowledge of the previous legislation upon the subject, that the words used should be unambiguous, and should always be used in the same sense, and that there should not be legislation by reference to previous Acts. As to the two first principles there can be no dispute. They resolve themselves into this principle, that a parliamentary draughtsman should know his trade. That is a principle which cannot be gainsaid, but it is one which is not always acted upon. The third of these rules is more open to question. To pile Amending Act upon Amending Act—to repeal portions of Acts in a snippetty manner—of course leads to great confusion. But if it were made an absolute rule that no Act of Parliament should refer to another Act,—that, for example, it should not be permissible to incorporate in one Act a clause of general application contained in another Act, the result would be that our statutes, bulky as they are at present, would become so voluminous that no ordinary lawyer would be able to find house-room for them. They would storm the attics and invade the drawing-room.

One of the most patent causes of the obscurity and occasional unintelligibility of Acts of Parliament is this, that the draughtsmen employed are not sufficiently acquainted with the previous legislation on the subject. A very notable instance of this may be found in the Ballot Act of 1872. Any one who has had occasion to consider this Act with attention must have seen that the draughtsman who prepared the Scotch clauses of the Act was very slightly acquainted with the previous Scotch Election statutes. He displayed an ignorance of Scotch law that would have qualified him to write an article in the *Times*. Another cause of the obscurity of Acts of Parliament is the process of alteration made in committee. A clause is altered and re-altered until it is made on some occasions altogether unintelligible and inconsistent,—more frequently is made inconsistent with other provisions in the same Bill. There is no official provision for remedying this obvious risk of error. If the error is avoided, it is because some private member gives more than usual pains and attention to the subject. The error is avoided more by luck than by good guidance. Another cause is, that a Bill which passes one House of Parliament in a tolerably decent state is in some parts altered in the other House on a principle quite other than that which originally was its pervading principle. Thus, when the Ballot

Bill left the House of Commons, there was no provision made for identifying the votes in case of a scrutiny. Consequently there was a clause in the Bill (section 25) providing that, when it was proved that a voter had been bribed, a vote should be struck off the total number given for the candidate on whose behalf the voter had been bribed. But the House of Lords inserted provisions in the Bill which enabled a ballot paper to be traced and identified. Consequently, the ordinary provisions for striking off a vote obtained by bribery or other corrupt practice applied. But the House of Lords omitted to consider section 25. That section was really rendered superfluous; but the House of Lords omitted to strike it out. When the Bill returned to the House of Commons, attention was drawn to the omission to strike out the unnecessary provision of section 25; but as the clause had passed both Houses, it was, according to parliamentary law and practice, impossible to touch it. This led to a difficulty in the Boston Election Petition, which was not met by the judges of the Court of Common Pleas, for the simple reason that was impossible to meet it. The knot was not untied, it was cut.

We in Scotland who have to read and interpret Acts of Parliament are more hardly tried than English lawyers are. In our case there is an additional evil to contend with—another ingredient in the cauldron. Our Scottish law is in many respects different from the law of England; but this difference is not always kept in view by those who have the conduct of legislation. Sometimes an Act is passed which is intended to apply to England and Ireland alone; but there is no express restriction of its operation to these countries. The question then arises whether the Act does or does not apply to Scotland. Of this the Apportionment Act is a remarkable instance. Clearly the Act was not intended to apply to Scotland, and nobody in Scotland suspected its existence until some years after it was passed. Yet in the famous case of *Bridges v. Fordyce*, it was held that the Act did apply to Scotland. The Powers Act of last year may prove to be a similar case. It was obviously intended to apply to England alone. Its application, however, was not restricted to England. If it applies to Scotland, it effects a great alteration in one department of our law. The question will very likely come up for the decision of the whole Court some day or other. But it is quite certain that nobody in Scotland or out of Scotland was aware of the possible or probable change in our law until it was pointed out, after the Act was passed, in the pages of this Journal. Again, when Bills are brought into Parliament, applying and meant to apply to the three Kingdoms, it is the practice to insert special clauses so as to make the Acts workable in Scotland. This introduces an additional labour and difficulty in the construction of such Acts. We think that when there is such a marked difference in the existing law in England and Scotland as to necessitate the introduction of clauses exclusively applying to Scotland, it would save a great deal of trouble if a separate Act were passed for this country.

*Mr. Patrick Fraser on the Appellate Jurisdiction of the House of Lords.*—We reprint a letter of Mr. Patrick Fraser, Advocate, on the Appellate Jurisdiction, which appeared in the *Standard* and other newspapers last month prior to the withdrawal of Lord Cairns' Bill. The immediate importance of the letter, of course, is over. But it is able, it is learned, and it contains a good deal of information which is the result of special research, and which cannot be easily obtained elsewhere. We reprint the letter in order to preserve it in a permanent form, and it seems to us desirable that it should be preserved, because the information which it contains may be of use at a future day. It is not likely that the Appellate Jurisdiction of the House of Lords will be menaced for some little time to come. But the thing which hath been is the thing which shall be, and there is no new thing under the sun. If in another generation a renewed attack is made on that jurisdiction, we are certain that no more able and learned argument on behalf of the House of Lords will be offered in any quarter than that which has been presented in the letter of Mr. Fraser, who has done yeoman's service in the fight.

SIR,—I request leave to state the grounds on which the Judicature Bill, now pending in the House of Lords, which proposes to extinguish the jurisdiction of that House in appeals, is objected to by those members of the profession with whom I agree. At the outset, I think I am safe in saying that five hands would not be held up in all Scotland in support of the bill as it is at present ; and, although we had recently a division in the Faculty of Advocates, both the motions concurred in stating that the House of Lords was a better tribunal than that which is proposed in its room.

This bill is the second attempt to break the Treaty of Union—the first being that when the Parliament of Hanley and Bolingbroke imposed upon Scotland the yoke of patronage, which has had so disastrous a history. But that was not so clearly a violation of a solemn treaty as the present attempt of a Government which, if it does not inherit all the principles of the administration of Bolingbroke, seems to inherit its traditions. The history of the appellate jurisdiction in Scotland, and the way in which it was settled by the Treaty of Union, is important in the present discussion, and possesses somewhat of dramatic interest.

The right of appeal to Parliament from the judgments of the Court of Session was asserted by the Scottish Bar in the year 1674, and for so doing the members of the Faculty of Advocates were banished from Edinburgh by the authority of the Crown—Charles II. being then King. The people of Scotland would not submit to this, and accordingly, in the Claim of Right presented to King William and Queen Mary in 1689, this constituted one of the articles :—“That it is the right and privilege of the subjects to protest for remeal of law to the King and Parliament against sentences pronounced by the Lords of Session.” That Claim of Right was accepted as the condition upon which these sovereigns were to be recognized as King and Queen of Scotland.

So stood the matter until the Treaty of Union ; and in the discussion of that Treaty no subject occupied a more prominent place than the legal institutions that were to be left there for the administration of justice. We can trace clearly how every line of the 19th article of the Treaty, which deals with this subject, was discussed, because the minutes of the Commissions of both countries have been preserved and printed. Several portions of the article are declared to be alterable by the Parliament of Great Britain. The rest of the article is not to be so alterable, and the important provision which bears upon the subject now under discussion is one of the latter. It is in the following terms—“That no

causes in Scotland be cognoscible by the Courts of Chancery, Queen's Bench, Common Pleas, or any other Court in Westminster Hall, and that the said Courts, *or any other of the like nature after the Union*, shall have no power to cognosce, review, or alter the acts or sentences of the Judicature within Scotland, or stop the execution of the same. No power is here given to the Parliament of Great Britain, as is given by other provisions in the same article, to make any alteration or change upon this agreement. The Scottish Parliament upon this point were firm, although in regard to other provisions in the same article they yielded (after argument with the English Commissioners) to the granting of a power of alteration to the Parliament of Great Britain. Thus, in dealing with the Court of Session, the article declares that the Judges shall have certain qualifications, and be capable of being appointed only from certain bodies, who are specified. As originally proposed, the clause was absolute, and contemplated no alteration by the Imperial Parliament. But on the 3rd January 1707, at a meeting of the Scottish Parliament, this motion was made—"But before voting, it was moved that the qualifications made, or to be made, for capacitating persons to be named Ordinary Lords of Session shall be alterable by the Parliament of Great Britain, and after debate it was put to the vote, *alterable or not*, and it was carried *alterable*" (Acts of the Parliament of Scotland, vol. xi. p. 381); and accordingly the article finally agreed to contained this clause following the declaration as to what should be the qualifications of the Judges—"Yet so as the qualifications made, or to be made, for capacitating persons to be named Ordinary Lords of Session may be altered by the Parliament of Great Britain."

Again, there is another portion of this 19th article which deals with the Admiralty Court of Scotland which was to be "continued," but "subject, nevertheless, to such alterations and regulations as shall be thought proper to be made by the Parliament of Great Britain." The history of this power of alteration shows how slowly this concession was agreed to. A meeting of the Scotch Commissioners appointed to treat for the Union was held on the 29th May 1706, at which the Lord Chancellor of Scotland gave to the Board a proposal to be submitted to the English Commissioners, which was adopted and sent to the English Commissioners, who returned an answer to the effect that "the Lords Commissioners for England, having considered the several proposals contained in the paper delivered the 29th inst. by the Lords Commissioners for Scotland, and being extremely desirous to bring this treaty to a speedy and happy conclusion, do agree to the same, *reserving still the consideration of the Courts of Admiralty for Scotland to the further progress of this Treaty*." Further consideration of this matter was had by the Commissioners of both countries, the result being that the Scotch Commissioners on the 11th June 1706 modified their demands to the retention in Scotland of a Court of Admiralty, such as is in England, for the determination of maritime causes relating to private right, and on the 14th June 1706 the Lords Commissioners for England sent a communication to the Scotch Commissioners intimating that they agreed to the proposal of the latter, "with this addition, that the Admiralty Court proposed to be continued in Scotland after the Union shall be subject to such regulations and alterations as shall be thought proper to be made by the Parliament of Great Britain." (Thomson's Acts, vol. xi., appx. 179.) This addition was added to the article; and in virtue of the reserved power, the Imperial Parliament have made alterations and reforms on the Scotch Admiralty jurisdiction.

It will thus be seen that there were matters upon which it was contemplated alterations might be necessary, and in such cases the Treaty of Union expressly conferred the power—a power demanded with pertinacity by the English Commissioners, and conceded with reluctance by the Scotch. No power, however, was given to annul what constituted the cardinal provision of the article, that the English Courts of Law and Equity, as then constituted, *or any other Court of a like nature*, created by a Parliament in which there was an overwhelming majority of English members, should have no right to sit in judgment upon any cause coming from Scotland. That remains unalterable, if the sole authority

for alteration be the Parliament of Great Britain. Clearly it never was in the contemplation of the parties to the Treaty of Union that those clauses which were not declared to be alterable might be annulled on the following week by a vote of the Imperial Parliament, against whose action to this effect so many anxious safeguards were taken, and whose power of alteration was so jealously defined.

It is quite true that the present Parliament may pass an Act, as that of Harley and Bolingbroke did, abolishing an article of the Treaty; and as Scotland is not Ireland, it is probable enough that this will evoke no seditious speeches or give rise to tumultuary meetings. But Parliament have just as much power to annul the whole Treaty from beginning to end as they have to annul the 19th article. The history of the violation of the Treaty in 1712 gives little encouragement to a repetition of the experiment. We may not have the same riots, heartburnings, secessions, and disruptions which were the consequence of that famous measure, but we will have constant discontent with the administration of justice by a Court entirely ignorant of our laws.

It is in vain to say that in extinguishing the jurisdiction of the House of Lords, and compelling the people of Scotland to go to this new Court at Lincoln's Inn, faith is still kept with them, because the new Court is called an *Imperial Court of Appeal*. It is an Imperial Court only in name. It is to be composed almost entirely of English lawyers, the majority of whom have never known anything of Scottish law and Scottish procedure, and have never opened a book on Scottish law, except immediately to shut it. It is a Court of the "*like nature*" as the Court specially denounced in the Treaty. It is no difference to say that it is to sit at Lincoln's Inn, and not at Westminster. The First Division of it, to which appeals from Scotland are to be brought, is to consist of (1) the Lord Chancellor; (2) the Chief-Justice of England and the Master of the Rolls for two years, and then the Chief Justice of the Common Pleas and the Chief Baron of the Exchequer for the next two years, and so on in rotation; (3) three ordinary Judges from the Imperial Court are to be selected by Her Majesty, of whom not one need be any other than an English lawyer. This makes six. But (4) three other Judges are wanted to make up the First Division, and these are called *additional Judges*, who are specified as "persons who having held" the office of a Judge in the Superior Courts in England, Scotland, Ireland or India, "shall declare their willingness" to serve as such additional Judges. These unfortunate persons are to receive no salaries. They are retired Judges, who have served their time and are enjoying their pensions. The two from Scotland who are selected for this great appointment are the Lord Justice-General and the Lord Justice-Clerk, and the notion seems to be that either of these two eminent Judges shall, after his career is ended by faithful service in Scotland, remove from his home in Scotland, take up his establishment in London, and sit as a Judge in this Court of Appeal for the mere love of the thing, or perhaps under the impulse of a noble patriotism.

Of course this is a delusion and a mockery. A man in the prime of life and with an ample fortune, and having an enthusiasm in the practical administration of the law, might be found to do as Lord Kingsdown did, devote himself to this gratuitous and onerous labour. But he was an exception, and his pecuniary circumstances were fortunate. It is necessary to assume that the "*additional Judges*" who are thus to labour are under the influence of other motives than those which ordinarily guide human actions, before it can be gravely thought that any one of the persons named in this bill "would signify his willingness" to exhibit the grand devotion to his country demanded of him.

What I chiefly dwell upon is the fact that this Divisional Court is composed of that class of men against whom the 19th article of the Treaty of Union struck. The majority are not merely English lawyers, but they are lawyers of the common law side of the English system—men to whom would be required an explanation of the very elements of our Scottish law and procedure before they could be in a condition to pronounce judgment in a Scottish cause. It



requires no great spirit of prophecy to anticipate what would be the fate of appeals from Scotland to such a tribunal. Judges who had to learn the very alphabet of our legal system would find it to be much more easy to arrive at their conclusion by the application of rules in their own system, with which they were familiar. The assimilation of the law of the one country to that of the other may be a most desirable object, but not by working monstrous injustice to individual suitors. A decision of the Scottish Courts would inevitably be appealed, if the English law differed from ours; and, apparently aware of this, this Judicature Bill proposes, in defiance of the Claim of Right, to cut off the right of appeal altogether in causes where the value at stake does not exceed £500—a tyrannical proposal, and insulting and offensive.

Let it not, however, be thought for a moment that people in Scotland consider the procedure in the House of Lords in dealing with appeals as perfect. Far from it. And the House of Lords themselves have confessed it. The House only sits for four days a week, and not for half the year, and there is no legal obligation, though there may be a moral one (as some return for their pensions) upon ex-Chancellors to attend the hearing of appeals. The House fees, too, at every step of the process weigh it down with unnecessary expenses, which produce little in the aggregate, but a great hardship upon the individual suitor.

But granting all this, the House of Lords has proved a satisfactory tribunal of appeal, so far at least (and of this only I profess myself competent to judge) as regards Scotland. The men who sat there as Judges have attained their position after a large experience—a position which only great abilities could secure. No doubt in the course of centuries there have been exceptions to this rule. In the case of this institution, as of all others, there have been periods of mediocrity and decline. Heaven and earth have contended for the mastery in regard to the Lords who have decided upon appeals. But, upon the whole, we have had a succession of men who have studied not merely the technical Common Law of England—so opposite except in commercial law to ours—but great constitutional lawyers, men who have been engaged in Scotch appeals, and who from the ordeal through which they have passed have been able to free themselves from the influence of the peculiar system of law which they have specially studied, and have given satisfaction to the people of Scotland by convincing them that whether they affirmed or reversed the decisions of our native Courts, they gave effect to and recognised the authority of the Scottish law, though it might differ from that of England. We have no guarantee that it will be in the future as it has been in the past; and that Common Law Judges in England, however honest, would be capable of deciding causes according to Scottish law.

The House of Lords in 1856 made certain recommendations for the removal of the more obvious defects in the working of their appellate jurisdiction. Whether the scheme which the Committee of the House then propounded, and which was embodied in a bill, was the best scheme in the circumstances, I do not stop to inquire. (See the Bill in 2 *McQueen's Reports*, app.) This however I will say, that if carried into effect it would have removed all, or nearly all, of the evils complained of by the people of Scotland. The Committee recommended that the House should sit for the hearing of appeals notwithstanding a prorogation; that expenses should be cut down to what was fair and reasonable; that two deputy Speakers, being Law Lords, should be appointed with salaries, whose duty it should be to assist the House in the performance of its judicial duties.

This Bill, embodying the recommendations of the Committee, passed the House of Lords and went to the Commons in the year 1856, where it was stopped by a prorogation. Whether this reform, or any other in the same direction, be adopted or not, I submit that the matter is one requiring far more grave and deliberate consideration than Lord Cairns is disposed to allow us. The way in which the Bill is sought to be hurried through Parliament has an ominous similitude to that adopted by Bolingbroke with regard to the Patron-

age Bill of 1712. That Bill was crushed through Parliament in a few days, before the people of Scotland became aware of the intentions of the traitor-Minister who introduced it, and who in his blind folly imagined that it would aid him in his scheme of Jacobite restoration. We have not under the Constitution of the United Kingdom the same remedy against unconstitutional statutes which the Americans possess. By their Constitution, the Supreme Court of the United States may declare any Act of Congress to be unconstitutional and null. Nor have we now left to us any national representative body like our Scottish Parliament, who could treat with the Imperial Parliament for an alteration of the Treaty of Union. But there are modes of obtaining the opinion of the people of Scotland; and it is only just and reasonable that an opportunity should be afforded for the expression of that opinion. On the 30th of April in each year the Commissioners of Supply meet in their respective counties and give their opinion upon questions of pending legislation in regard to Scotland. We have, moreover, in the various Faculties of the Law scattered throughout the country the means of obtaining the opinion of lawyers; and we have also in the Town Councils the way of ascertaining—apart from public meetings—the views upon this subject of municipal electors. If all these bodies, or a majority of them, concurred in the proposed alteration in the Treaty of Union, nothing more perhaps might be necessary. I think I have said enough to show that they are entitled to the opportunity of saying yes or no. The majority at the command of the Lord Chancellor may send this Bill at once through the House of Lords to the Commons. When it comes there the people of Scotland are entitled to expect that their representatives will secure for them, if not justice and adherence to a solemn treaty, at least a hearing.—I am, &c.

PATRICK FRASER.

*Lengthy Sensational Trials.*—Our American friends are at present being favoured with a *cause célèbre*, which seems likely to rival in length and voluminous eloquence the famous trial in this country which made Dr. Kenealy Member for Stoke. On this subject the *Albany Law Journal* makes the following pithy comments:—

The lawsuit of Mr. Theodore Tilton against Rev. Henry Ward Beecher, "like a wounded snake drags its slow length along." We wish we could hear the "needless Alexandrine" that should "end the song." This case is nominally between Messrs. Tilton and Beecher, but to our view it might more appropriately be entitled Beach, Fullerton, and others against Evarts, Porter and others. It seems to have degenerated into a mere talking match between these eminent counsellors, and we are inclined to believe, from the manner in which it is conducted, that the only useful, or the most useful, purpose it will serve, will be to advertise these already well-known professional gentlemen. We originally intended to say something of the case on its termination, but have concluded that if we expect to have our own say concerning it, we would better not wait for that distant and improbable event, which looks as far away as the millennium or the discovery of the philosopher's stone, but announce our opinions to the contemporary generation, and while we are in unimpaired possession of such intellectual faculties as nature has bestowed on us. We wish to utter a word of warning to the distinguished judge presiding on this trial, and to the afore-said eminent lawyers and their associates. They have procured the Legislature to grant a new lease of life to the court in which they are engaged, but how about their own lives? Would it not be a

wise measure of precaution to have these also extended? Otherwise we see not how Messrs. Morris and Shearman can expect to hear the verdict, but opine that they must content themselves with bequeathing the little unpleasantness, like freedom's battle, "from bleeding sire to son," and let their heirs or assigns bring to a conclusion what their ancestors shall have so fiercely inaugurated. It would be well, also, to have the lives of the parties on the record insured, or to induce the Government to bestow a pension on them, or to have annuities conferred on them, or inoculate them with the asthma, or to adopt some other of the well-known methods of prolonging human existence. Unless some such measures are taken, we fear that the result will be similar to that in Warren Hastings' trial, where, according to Macaulay, "those who having been present on the first day, now bore a part in the proceedings of the last, were few, and most of these few were altered men;" where "the arraignment had taken place before one generation, and the judgment was pronounced by another;" where, "of the one hundred and sixty nobles who walked in the procession on the first day, sixty had been laid in their family vaults;" and where every thing in the court-room reminded the spectator "of all human things, of the instability of power, and fame, and life." We really think, after a due consideration of the chivalric Mr. Beach's heart-rending speech on the law point whether the plaintiff is a competent witness, that the counsel would do well to regard the inculcation of Hudibras,

"For brevity is always good,  
When we are or are not understood."

But Mr. Morris having made a three days' speech in opening for the plaintiff, Mr. Tracy is bound not to be behind for the defence, and we are told that he is now engaged in committing his speech to memory. We would like to be judge in this case; if we were, we would suggest to these loquacious gentlemen to offer to compromise their oratorical debts for ten per cent. We guess that the public would accept the proposition.

Another thing that strikes us is, that the counsel seem to be using up their thunder too fast in the adolescent stages of the case. If such lofty rhetorical flights are essayed now, we suspect that the counsel will soar away out of sight in the summing up. If we have such things in the green leaf, what may we not expect in the dry? If Mr. Tilton is such a sufferer and Mr. Beecher is such a sinner, at the end of five weeks, what may not their respective conditions of detriment and malfecundity be, say at the end of three months? Let the counsel, however, remember the case of the gymnast who took such a long run in order to essay a great jump, that on arriving at the scratch he was completely out of breath.

Another idea which we gather from this trial is, that it serves to demonstrate the inefficiency of cross-examination. The popular idea of cross-examination is that it is a kind of miraculous ram's

horn, on the blowing of which almost any witness must go down like the walls of Jericho. Indeed, we ourselves had rather looked to see the mutual friend, Mr. Moulton, drop all in pieces, when Gen. Tracy tackled him. But the extraordinary Mr. Moulton does nothing of the sort. Like Mark Tapley he seems to think his treatment is "jolly." The more he is ground the sharper he grows, and he not only never loses his temper, but more than once constrains the counsel to look sharply to find their own. The result of this cross-examination is to confirm us in our long-cherished opinion, that ninety-nine questions out of every hundred, asked on cross-examination, are unnecessary or injudicious.

We have also observed that this trial is a good thing for the newspapers. We would like to know the number of persons who, every day, religiously or irreligiously, read every word of the last day's proceedings in the daily journals. We would especially like to know who is the artist who depicts the leading counsel in woodcuts in the picture papers—whose several efforts in this line would, undoubtedly, be pronounced by his respective victims "the most unkindest wood-cut of all." We would like to possess the dramatic sensibilities and the rhetorical affluence of the reporters, who describe for us the precise facial appearance of all the actors in this domestic tragedy at frequent intervals, and who set before us in vivid phrase the electrical phenomena of the lawyers' sarcastic, scathing, denunciatory addresses. We would like to possess the mental discrimination and the manual agility of the stenographer, who seems to take down even the yawns of the judge and the aspirations (we were about to say, execrations) of the counsel. We don't wonder that in De Quincey's playful essay on Murder as one of the Fine Arts, frequent inquiry was made, "*Ubi ille est reporter?*" We think that killing a reporter in these times, if not praiseworthy, would be *damnum absque injuria*.

Again, we are filled with wonder and admiration by the contemplation of the immense mass of useful information on a great variety of subjects which this inquiry is evolving. Politics, religion, metaphysics, ethics, speculation, love, literature, both prose and poetry—nothing seems irrelevant. What any one of the counsel does not know of these topics, some other knows, or if not, nobody knows.

*Wanted, a Plutarch.*—Speaking of Lord Erskine, Lord Campbell said:—"As an advocate in the forum I hold him to be without an equal in ancient or modern times," but Lord Brougham seems to have been of the opinion that the brother, Harry Erskine, was almost, if not altogether, the equal of Thomas. In his autobiography (vol. i. p. 166) Lord Brougham said: "If I were to name the most consummate exhibition of forensic talent that I ever witnessed, whether in the skilful conduct of the argument, the felicity of the copious illustrations, the cogency of the reasoning, or the dexterous appeal to the prejudices of the court, I should without hesitation at

once point to his (Harry Erskine's) address on Maitland's case ; and were my friend Sunderdale alive, to him I should appeal, for he heard it with me, and came away declaring that his brother Thomas (Lord Erskine) never surpassed—nay, he thought, never equalled it." The Scotch bar at the commencement of this century was peculiarly rich in professional learning and forensic eloquence. Beside Erskine, Adam Gillies, William Tait, Robert Blair, and a half dozen other men of the highest repute as advocates, there was Charles Hope, on whose brilliant qualities as an advocate Lord Brougham dwelt with great fervour. He spoke of his eloquence as "seldom equalled, perhaps never surpassed," and he quotes the opinions of Laing (the historian) and Gillies, both opposed to Hope, that his "declamation excelled all they had ever heard," though "they had often heard all the great speakers in Parliament ; and these men were very far from prizing, as of any value, mere declamation unaccompanied with argument or statement." Even Pitt and Fox expressed great admiration at one of his speeches, and at one which Brougham and Horner and others of his friends who heard it thought to be a failure. It is to be sincerely regretted that the Scotch bar has not found a Plutarch.—*Albany Law Journal*.

*The Judicature Bill*.—"All's well that ends well," was the sentiment which occurred to us on reading of the withdrawal of this Bill. The intentions of the Government have not yet been announced regarding the appellate jurisdiction of the House of Lords in English appeals. The Act of Lord Selborne still remains, and by it the English appeals were transferred to the new Court. But it is clear that the clauses of that Act dealing with that matter must go too. The opposition of the English lawyers to the transference of the appellate jurisdiction has been as strong almost as that of the Scotch lawyers, and the opposition of the opposing peers is necessarily directed against the abolition of their jurisdiction in the case of English as well as in the case of Irish appeals.

The growth of the opposition to the abolition of the appellate jurisdiction of the House of Lords is a remarkable incident in legal and parliamentary history ; and its ultimate success displays the unwisdom of those who, although they are averse to a proposal, and believe it will have a pernicious effect, think it is of no use, and therefore impolitic, to oppose that which they regard as the inevitable. The inevitable does not always happen. If the proposal is a bad one, oppose it, and trust to luck for the event.

When the proposal was first made to abolish the appellate jurisdiction of the House of Lords, there was little opposition made to it either in Parliament or in the country. The peers apparently waited for some encouragement from the legal profession to assert their privileges. It might have seemed invidious for them to struggle for the maintenance of their rights in a matter which concerned the lawyers and the public fully as much as it did the peers.

It was for the lawyers and the public to take the initiative. The English lawyers took no great interest in the matter. The Scotch and Irish lawyers had taken no interest in the Act which transferred the jurisdiction in English appeals. They had no immediate interest in doing so; the Act did not apply to them. When the Act of the following year was made to apply to Scotch and Irish appeals, the situation had become complicated. The legal profession in Ireland no doubt opposed the measure. *Nemo me impune lacessit*, is a motto much more appropriate to the Irish lawyers than it is to us. Many of the Scotch lawyers thought that the opportunity of opposition had been allowed to slip. They regarded the transference of the English appeals to the new Court as an accomplished fact, and they fancied that there was no chance of a reversal of the decision; and there were undoubtedly serious objections to retaining the jurisdiction of the House of Lords in Scotch and Irish appeals alone, and weighty reasons in favour of the view that the ultimate Court of appeal should be an Imperial Court. Moreover, it seemed to many hopeless to struggle against a legal measure supported by the leading legal authorities on both sides of politics.

But what opposition there was increased—increased steadily, and increased among all sections of those who had any interest in the matter. That the peers should be willing enough to retain their privileges, should fight for the retention of that which the first Lord Shaftesbury called the most illustrious privilege of their House, and that they should be willing to take advantage of any change of view on the part of the legal public, is natural enough, and is quite right. The peerage as an order is powerful and imposing. But as a House, the House of Lords would not present a very imposing aspect to the people if it appeared in no other character than as an assembly which met at five o'clock and separated at a quarter past, after a few questions were asked which nobody cared about, and a few petitions were presented which nobody ever read. As a tribunal, however,—the ultimate tribunal for the three Kingdoms, as the supreme interpreter of justice, the House of Lords is a strong power, and a power whose efficacy is direct and whose influence is instant. In that respect it is important and conspicuous in the public eye. It is of no avail to say that it is really only a few lawyers who give the decision. It is still, in the public judgment, the House of Lords; and whether it be from sentimental and national feelings or from ancient associations, it is certain that the decisions of a few elderly lawyers, not acting under the style and title of the House of Lords, would not be regarded with equal respect and confidence. Then came the turn of the English lawyers. The more they looked at the proposal the less they liked it. They could not be influenced by such considerations as those by which other lawyers were animated—by considerations about the Treaty of Union, and by fears for the preservation of their own system of law. The

objections which they had were such as those lately stated in a letter to the *Times* by Mr. Watkin Williams, Q.C., M.P. It was thought that the new ultimate court would not be so satisfactory as the old one. Its tendency would be to be a fluctuating body—such as the Exchequer Chamber—"a scratch pack." It is possible that one might have to hunt after Judges of the Ultimate Court just as you hunt for members of the Committee of Privileges when you want a peerage, or justices of the peace when you want a license for a public-house. The opposition of the Scotch lawyers it is not difficult to understand, and their reasons are stated fully in the letter of one of the most learned of their number, which will be found in another page. For our part, we confess we have never had a wonderful fancy for the argument founded on the terms of the Treaty of Union. That is a good argument if we in Scotland seriously wished to preserve the jurisdiction of the House of Lords, and seriously objected to its abolition. But it is not a good one if we did not. It was, however, an argument happily directed when addressed to the members of the House of Lords themselves. The substantial reason was that we had no security for the preservation of our own system of jurisprudence. That system had been, in some respects, improved by the decision of the House of Lords, consisting of the two or three most able lawyers of the time, who from their practice at the Bar knew something of the law of Scotland, and who applied to it the principles of a large and general jurisprudence. But it would not have been improved, it would have been bit by bit absorbed and extinguished, if it had been subject to the decisions of, not the *most* eminent lawyers of their day, but men of the second rank (for this, on the average, they must necessarily have been), mere common lawyers, men steeped in the technicalities of so technical a system as the English common law is, and versed in nothing else. Fancy an English common lawyer judging of a question of Scotch conveyancing! If an action were raised for damage to a horse by another horse sticking its leg through a fence and kicking it, we should very likely have been told that the action would not lie, that an action of trespass should have been raised (*Ellis v. Loftus Iron Co.*). Technicality after technicality would have been introduced, principle after principle would have been extinguished, until our entire system had "melted into the infinite azure of the past."

"As one by one, at dread Medea's strain,  
The sickening stars fade from the ethereal plain,  
As Argus' eyes by Hermes' wand oppressed,  
Closed one by one to everlasting rest,  
Thy hand, great Anarch, lets the curtain fall,  
And universal darkness buries all."

A nation which parts with its law parts with a large share of its nationality and its intellectual independence. This fate has been averted for the present. Attempts, however, may be made from below as well as from above.

The failure of Lord Cairns' measure is due not a little to the opposition of the Scotch lawyers; and that opposition is due in great part to Lord Cairns. If he had acquiesced in the demand of the Scotch lawyers that the proposed new Court, which was to administer the law of Scotland, should necessarily contain one or more persons acquainted with that law, it is more than probable that the Scotch legal profession would have accepted his Lordship's proposal, and agreed to a change which not long since appeared to many inevitable. Not only did the Lord Chancellor refuse to do so, which was of itself bad enough, but he supported his refusal by a statement which was even less acceptable. The only reason alleged was, that there might be no Scotch lawyer fit for the office. The refusal to accede to the demand was unwise, and the reason given was still more unwise. It is never safe for even the most powerful personage to make a statement which is personally offensive, and which is therefore sure to excite a vigorous hostility.

That the opposition of the Scotch and Irish lawyers had a great effect was acknowledged by Lord Cairns. In withdrawing the Bill, his Lordship mentioned among other reasons for so doing the opposition of representative men like Lord O'Hagan and Lord Moncreiff. These are indeed representative men, and their hostility was representative also. It represented the turn of feeling on the subject, and the gradual growth of the opposition. Lord O'Hagan did not at first oppose, but indeed supported, the proposal to transfer even the Irish appeals to the new Court. But that was in 1873, and "many things have happened since then." It may be remembered that Lord O'Hagan was last year twitted by Lord Cairns with his change of opinion on the subject. It has been said recently that Lord Moncreiff never opposed, but on the contrary always supported, the proposal of Lord Cairns and Lord Selborne. This is inaccurate. Lord Moncreiff spoke three times on the subject in his place in Parliament last Session. On the first reading of the Bill of last year, Lord Moncreiff apparently being impressed with the impossibility of retransferring the appellate jurisdiction in English appeals from the new Court to the House of Lords, and thinking it unwise and absurd to retain the jurisdiction of the latter for Scotch and Irish appeals alone, tried to make the best of it, and endeavoured to secure the presence of a Scotch lawyer in the new tribunal. But on the second reading his Lordship expressed his opinion in decided terms in favour of the retention of the jurisdiction of the House of Lords. And in committee Lord Moncreiff both spoke and voted in favour of Lord Redesdale's resolution, that the provisions of the Supreme Court of Judicature Bill of the previous year (1873), which prohibited appeals to the House of Lords, be repealed. Turning to Hansard, we find his Lordship represented as having spoken on that occasion in these terms:—"He now repeated his statement that the appellate jurisdiction of their Lordships' House was made an express stipulation by the Act of Union, and in 1869 [*sic*] it was declared to be the plain right of the people of Scotland to



appeal to their Lordships against the decisions of the Lords of Session. The Treaty of Union expressly provided that the Courts of Scotland should remain as then constituted—that causes in Scotland should not be cognizable by the Court of Chancery or by the Courts of Westminster, and that no Court in England, save only the House of Lords, should have jurisdiction in Scotch causes. That had continued to be the constitution up to the present time. Now, they proposed to do away with it all. He was surely entitled to say, that the opinion and feeling of Scotland were entitled to consideration, and that the cases that came up from Scotland were not to be handed over to the ordinary courts of the realm. He should certainly never have taken the course the noble Lord had done on the grounds he had taken, but if he were asked his opinion he should say, from his long experience of the manner in which the Scotch appeals had been dealt with, he should prefer to retain a jurisdiction which was of the most august character, and which had existed for centuries, rather than resort to the new tribunal. He thought the people of Scotland would indeed be ungrateful if they did not wish for a continuance of such a tribunal. But if the law here was wholly changed, his fear was that no court would be established which would be so advantageous as a court of final appeal as this House. On that ground he was in favour of the noble Lord's resolution."

*Spring Vacation Arrangements—The Circuits.*—The following are the arrangements for the Spring Circuits:—

*North.*—Lord Justice-Clerk and Lord Young. *Inverness*—Thursday, 1st April. *Aberdeen*—Monday, 5th April, at 12 o'clock noon. *Dundee*—Thursday, 8th April, at 12 o'clock noon. *Perth*—Monday, 12th April, at 12 o'clock noon. W. E. Gloag, Esq., Advocate-Depute; Æneas Macbean, Clerk.

*West.*—Lord Deas and Lord Mure. *Inveraray*—Tuesday, 13th April. *Stirling*—Friday, 16th April. *Glasgow*—Tuesday, 20th April. Roger Montgomerie, Esq., Advocate-Depute; William Hamilton Bell, Clerk.

*South.*—Lord Ardmillan and Lord Neaves. *Ayr*—Tuesday, 6th April. *Dumfries*—Friday, 9th April. *Jedburgh*—Tuesday, 13th April. James Muirhead, Esq., Advocate-Depute; Alexander Ingram, Esq., Clerk.

*Box Days.*—Thursday the 8th and Thursday the 29th days of April have been appointed the Box days in vacation.

*Bill Chamber Rotation of Judges.*—Monday 22nd March to Saturday 27th March, Lord Shand. Monday 29th March to Saturday 10th April, Lord Craighill. Monday 12th April to Saturday 24th April, Lord Curriehill. Monday 26th April to Saturday 8th May, Lord Ormidale. Monday 10th May to meeting of Court, Lord Gifford.

*Court Days in Vacation.*—A Judge will, on Wednesday 14th

April and on Wednesday 5th May, sit in the Court of Session at 11 o'clock, and Rolls will be taken up on the immediately preceding Mondays, in terms of the "Court of Session Act 1868" and relative Act of Sederunt.

*Appointments.*—J. M. DUNCAN, Esq., Advocate, author of some well-known works in legal literature, has been appointed Secretary to the Board of Northern Lights.

JAMES ROBISON, Esq., Advocate, called to the Bar in 1831, has resigned the office of Sheriff-Substitute of Ayrshire at Ayr, which he has held for the last thirty years. His successor is W. A. O. PATERSON, Esq., Advocate, called to the Bar in 1856.

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## Review.

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*The Law and Practice of England and Scotland in Affiliation Cases.*  
By HUGH BARCLAY, LL.D., Sheriff-Substitute, Perth. London:  
Reeves & Turner. Edinburgh: T. & T. Clark.

THIS pamphlet was intended to be read as a paper at the meeting of the Social Science Association in Glasgow in October last. By some accident the paper was not read at the meeting, and it has consequently been printed in pamphlet form. We observe it has recently been reprinted *in extenso* in the *Law Times*. From the knowledge and experience of the author, who in all probability has had, during his long term of office as a Sheriff-Substitute, a greater number of affiliation cases before him than any Judge in Scotland, and who evidently has given great pains in comparing the laws and forms of procedure of the two countries, the little work cannot fail to be useful and instructive to all those who have occasion to deal with this class of cases, especially to Sheriff-Substitutes and practitioners in the local Courts, and also to those who are on the outlook for every hint of legal improvement.

It may be useful to point out some of the points of difference between the law of England and that of Scotland upon this subject. In England all cases of affiliation are adjudicated on by Justices of the Peace, and the law on the subject is wholly statutory; in Scotland the cases are dealt with at common law, and although there still remains a jurisdiction in the Justices, it is almost always by the Sheriff that these cases are tried. In England a claim may be made even before the child is born; in Scotland no action of affiliation can be made until after the birth. In England the mother may apply to a Justice of the Peace for a summons against the putative father any time within twelve months from the birth of the child, but not afterward, unless on proof that he had paid

money for its maintenance, or that he was absent from England during those twelve months. This limit of time does not apply to orders at the instance of parochial authorities. In Scotland the ordinary long prescription applies. In England the order on the father is to pay a sum not exceeding five shillings a week, with the expenses incident to the birth, and to the funeral if the child has died before the order. If the father fails to implement the order, the sum may be recovered by distress and sale of his goods; failing recovery, he may be sent to prison for a term not exceeding three months. In Scotland he may be sent to prison also if he does not pay, but only as any other civil debtor, and like any other civil debtor, he is entitled to be alimented by the creditor. As to the rates of aliment, etc., the author says:

"The rates unfortunately vary in different counties, and are slightly increased with the rank of the father. This last obviously is not wise, as forming an inducement to a woman to select, not according to truth but for ability of the man to give support. The common allowance in Scotland is 30s. for the expenses attending the birth, and 30s. for each of the three first or nursing quarters, and 25s. for each subsequent quarter (that is about 2s. 6d. in the week), payable quarterly in advance, with interest, until the child, if a female, reaches the age of ten, or if a male seven years. The rates are supposed to be one-half of the actual cost of support, the mother contributing the other half, either by her nurture or in money where the child is given in charge to a third party."

From the report of a case in the last number of the *Journal*, it will be seen that an increase has recently been made in some counties in the sums given for aliment and childbed expenses. In England, where a woman fails in her first application she may bring another. An appeal is allowed where an order is given, but none is provided where it is refused. Hence the refusal of an order has been regarded rather as a nonsuit than as a judgment of absolutor.

"The most important inquiry in this branch of law (says Dr. Barclay), and that which induced me to write this paper for the consideration of the legal profession, is the nature and form of the evidence necessary to support the mother's claim, and without which it falls to be negatived. In England the mother's oath is first admitted to the paternity, and the order is given, 'where her evidence is corroborated in some *material* particular by other evidence to the satisfaction of the justices.' It is believed that one witness in England, as with us, is sufficient to corroborate. What is a material fact is of necessity left to the judgment of the Court. This depends much on the status, ages, and character of the parties, and the customs and usages of the locality. Therefore it is wisely held that in this class of cases precedents are of no authority, as what would be justly held material in one case might be quite immaterial in another. In England the defendant may be called as a witness by the mother, or he may offer himself, as such for himself. The evidence, in the Petty Sessions, is not reduced to writing, unless where it is to found an order of commitment to prison. Notes are frequently taken so as to

guide to the after examination of the witnesses. On an appeal to Quarter Sessions the same witnesses may be re-examined, and other witnesses, for the first time, called on either side, which renders the appeal an original case."

After stating what was the law and procedure under the old system of *semi plena probatio*, on which he casts a longing, lingering look behind, the author states his views on the effect of the change effected by the Evidence Act of 1853:—

"The Evidence Act, to the surprise and regret of the judges, having thus swept away the very ancient law of *semi plena*, the consequences have been disastrous. Now almost every case of affiliation is opposed, since it has now become a wide-spread opinion in certain classes, that all the man has to do is to swear to non-connection, and then he must be liberated from all claim. In almost every opposed case there is oath against oath, and, therefore, there exists no manner of doubt that there exists gross perjury on one side or the other, and in my experience almost always on that of the man. The matter at issue is, of course, of an occult nature, and, therefore, it is difficult to convict the man of perjury, even though, in the civil cause, he has been disbelieved. Consequently very few criminal prosecutions have been attempted, though there existed no manner of doubt of the perpetration of the crime which above every other loses the moral tie which binds man to truth and probity, and lets in every other offence. Where there exists meagre proof of familiarity between the parties, within the prescribed period, and where there is oath against oath of the parties, I have been grievously pained in absolving the man because of want of legal evidence, though satisfied morally of the truth of the mother's claim, and the deliberate perjury of the man. Such a result would not have arisen under the ancient mode of procedure. It has been remarked that in general the woman is in the right. She has already suffered in her character, and has the permanent burden of the child, and must, whatever be the issue, continue to bear the one half of the cost of its support. The man has his character as well as his purse at stake, and by perjury he seeks to liberate himself at once from the stain of guilt and any contribution for the child. The temptation to false swearing is, therefore, of double force on the man. Another side issue is often raised in these cases. The defender avers that other men, one or more, have had access to the pursuer during the legal period. He produces these men, who now can safely swear to their guilt because that the woman has fixed, on oath, the paternity on another, and these scapegoats may roam at large in safety. The only ground of suspicion against the woman is where the action is directed against a person of some wealth, and, in defence, one of comparative poverty is alleged as the true father. This seldom, in my lengthy experience, has occurred, for generally the parties who are set up as likely parents are of the same class, and that of the labouring ranks. It is quite possible that with women of very loose habits (but who rarely become mothers) there may be a difficulty in the mother definitely selecting the true author of her pregnancy. But my conviction is that she seldom, if ever, fixes on a man who at least *might* not have been the father of her child."

Whether the learned Sheriff is right or wrong in his views, they

are at least, considering the experience he has had of the working of the Act, entitled to attention. (From a table he gives, it appears that 735 affiliation cases have been brought before him between the years 1860 and 1872.) It is however quite vain to think of returning to the old system of *semi plena probatio*. The whole tendency of modern legislation is to remove the barriers against the admission of evidence,—to let it in, and to take it for what it is worth. No doubt in this way you get more lying,—that is a matter of course; but on the whole you get more truth. If there were to be any exception from the modern principle as to the admission of evidence, it would be in this class of cases, where the defender is under such a strong temptation to perjure himself.

But the judges have kept in view both this temptation and the occult nature of the matter at issue, and their judgments adverse to the defender have very often turned, and generally do turn, upon circumstances which in any other class of cases would hardly have been regarded. It is worthy of notice that out of the 735 cases referred to by Sheriff Barclay, the woman made good her claim in 229 instances, notwithstanding the denial on oath of the man, while only in 66 cases did the man's negative oath prevail against the woman's affirmative oath.

The author concludes his remarks on the subject of evidence with this suggestion:

“It is a matter of consideration whether some form of process similar to the ancient *semi plena* of Scotland, with the mother's oath in supplement, might not be found a better mode of obtaining justice in this increasing class of cases. It has been suggested that a mode, not unknown in continental countries, might be still more efficacious in reaching the truth. First of all the parties should be separately interrogated by the judge in presence of the agents, but not on oath, and then if necessary confronted with each other. Such sifting of facts might in most of these delicate cases render farther evidence unnecessary, or where such is necessary would greatly limit its extent by confining it to ascertaining which party has spoken the truth, and is in the right.”

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#### ACTS OF SEDERUNT ANENT EXAMINATIONS OF LAW AGENTS.

ON 20th December 1873, an Act of Sederunt relative to the examination of law agents was passed by the Lords of Council and Session, in virtue of the powers conferred on them by the Statute 36th and 37th Victoria, cap. 63 (see *ante*, vol. xviii. p. 40). This Act was amended by an Act of Sederunt passed on 28th January 1874, which is as follows:—

*"Act of Sederunt to amend the Act of Sederunt of 20th December 1873,  
anent Examinations of Law Agents.*

"EDINBURGH, 28th January 1874.

"The Lords ENACT and DECLARE,—

"I. That the 4th Section of the said Act of Sederunt shall not be held to apply to Candidates for admission as Law Agents, who, prior to the passing of the said Act of Sederunt, have attended, or have commenced to attend, the Classes of Scots Law and Conveyancing in a Scottish University; but such Candidates shall be held to have sufficiently qualified themselves by attending on such classes, though their attendance may not have been in two separate winter Sessions, and though they may not have taken part in the Examinations of such Classes.

"II. Whereas, by the Statute 36 and 37 Vict. cap. 63, sec. 9, provision is made for the remuneration of the Examiners to be appointed by the Court, by requiring each Applicant for admission as a Law Agent, prior to his Examination, to pay Two Guineas to the Chairman, to be divided among the Examiners present, but no provision is made by the said Statute for defraying the expenses attending the conduct of the said Examinations: And whereas the Judges of the Court, or any seven or more of them (of whom the Lord President and Lord Justice-Clerk shall be two), are by the 8th section of the said Statute, empowered to make rules for conducting the said Examinations; and it is necessary for the proper conducting of the said Examinations, that provision should be made for defraying the expenses attending the same: The Lords appoint and ordain each Applicant for admission as a Law Agent, at the time of presenting his Petition to the Court, to pay to the Clerk of the Examiners the sum of Thirty Shillings, to be applied by the Examiners in defraying the said expenses.

"III. It shall be the duty of the Clerk of the Examiners:—

- "(1.) To attend, when required, the Meetings of the Examiners, and to keep their Minutes and Records.
- "(2.) To arrange Diets of Examination, and give reasonable notice thereof to Apprentices and Applicants.
- "(3.) To conduct any Correspondence connected with the business of the Examiners.
- "(4.) To present and carry through, when required, Petitions for admission of Law Agents, free of expense to the Applicants, the Petitions being signed by the Applicants, without the necessity of employing Counsel.

And the said Clerk shall be remunerated for the performance of all such duties by an allowance to be fixed by the Examiners, and to be provided out of the monies arising from the payment by Applicants of the said sum of Thirty Shillings each.

"IV. The Examiners shall, on or before the 20th January yearly, submit to the Lord President an account, charge and discharge, for the year ending on the 31st December immediately preceding, of the monies arising from the payment by Applicants of the said sum of Thirty Shillings each.

"And the Lords APPOINT this Act to be inserted in the Books of Sederunt, and to be published in the usual manner.

(Signed) JOHN INGLIS, *I.P.D.*"

Another Act of Sederunt has recently been passed, altering the regulations in both the previous Acts, which is in the following terms:—

"*Act of Sederunt anent the Admission of Law Agents.*

"EDINBURGH, 18th March 1875.

"The Lords ENACT and DECLARE—

"I. That the expression 'Classes in Arts,' in the Act of Sederunt of 20th December 1873; shall be held to include only those classes which form part of the curriculum required for a Degree in Arts.

"II. Whereas the Fees directed by the Act of Sederunt of 28th January 1874 to be paid for defraying the expenses connected with the examinations under the Statute 36 & 37 Victoria, cap. 63, and relative Acts of Sederunt, have proved quite inadequate for that purpose, the Lords appoint the following Fees to be paid by each Applicant in lieu of the Fees provided in said Act of Sederunt, viz:—

"1. For an Apprentice's Entrance Examination, 10s. 6d.

"2. For an Examination in General Knowledge, £1, 1s.

"3. For an Examination in Law, £1, 1s.

"These Fees being payable once only, although the Applicant, having failed to pass an Examination, should come up for Examination again.

"4. For the Clerk presenting and carrying through the requisite Petition to the Court for an admission as Law Agent, including the drawing of the Petition, £2, 2s.

"And the Lords APPOINT this Act of Sederunt to be inserted in the Books of Sederunt, and to be printed and published in the usual form.

JOHN INGLIS, *I.P.D.*"

## Notes of English, American, and Colonial Cases.

PRINCIPAL AND AGENT.—*Undisclosed principal—Contract with agent—Election.*—B., a butty collier, working upon a mine of the defts., gave orders in his own name to the plts. for a supply of gunpowder to be used in the mine. The gunpowder was supplied, and subsequently the plts. became aware that the defts. were B.'s principals. B. filed a petition in liquidation, whereupon a clerk of the plts. made an affidavit of debt, treating B. as the debtor, for the purpose of proving under the liquidation. The affidavit was placed upon the file of proceedings, although an endeavour was made by the plts.' attorneys to prevent its being so filed. It remained upon the file, but the plts. took no further step in the liquidation, nor did they receive any dividend:—*Held*, that there was no such election by the plts. to treat B. as their debtor as would be a bar to their maintaining an action against the defts. the principals.—*Curtis v. Williamson*, 44 L. J. Rep., Q. B. 27.

NEGLIGENCE.—*Accumulation of snow on pavement—Municipal corporation.*—*Held*, that a municipal corporation is responsible for injuries to a foot passenger caused by a dangerous accumulation of ice and snow on the side-walk.

The principle laid down is this : " A municipality cannot prevent the general slipperiness of its streets, caused by the snow and ice during the winter ; but it can prevent such accumulations thereof, in the shape of ridges and hills, as render the passage dangerous."—*M'Lachlan v. City of Corry* (Supreme Court of Pennsylvania), 7 American Legal Gazette, 13.

**NEGLIGENCE.—Contributory negligence—Child.**—Action by a child, seven years of age, to recover for personal injuries caused by deft.'s alleged neglect in allowing a turn-table, situated in a public place, to remain unfastened and unguarded, and permitting children, among whom was plt., to turn and play upon the table. *Held*, that it was error to give judgment for deft. on the pleadings. Also *held* that the plt. occupied a very different position from that of a mere voluntary transgressor upon the deft.'s property ; and that when deft. sets before young children a temptation which it has reason to believe will lead them into danger, it must use ordinary care to protect them from harm. What is proper care is a question of fact for the jury.—*Keeffe v. Milwaukee & St. Paul Ry. Co.*, 7 American Legal News, 138. [See *Kay v. Pennsylvania Ry. Co.*, 3 American Reports, 628, and *Campbell v. Ord and Madison*, 1 Rettie, 149.

**NEGLIGENCE.—Railway—Injury by drunken passenger.**—In *Pittsburg, etc., R. Co. v. Pillow*, 7 Leg. Gazette, 13, the Supreme Court of Pennsylvania decided that where a passenger, on a railroad car, lost an eye through the quarrel of drunken men, the company was liable to the injured passenger. The decision proceeds on the ground that carriers of passengers are just as liable for the misconduct of fellow-passengers, as they are for the mismanagement of the train. It is the duty of the company to maintain order ; and if they are negligent in this respect, and injury results to a passenger, they are liable. In *Railway v. Hinds*, 53 Penn. St. 512, a passenger's arm was broken in a fight between drunken persons, and the company was held liable because the conductor did not stop the train and endeavour to expel the disorderly persons. In *Goddard v. Railroad Co.*, 57 Me. 202 ; S. C., 2 Am. Rep. 39, it was said that the carrier " must not only protect his passenger against the violence and insults of strangers and co-passengers ; but, *a fortiori*, against the violence and insults of his own servants." In *Flint v. Norwich, etc., Transp. Co.*, 34 Conn. 554, it was held that it is the duty of passenger carriers to repress all disorderly and indecent conduct in their cars, and that persons guilty of rude or profane conduct should at once be expelled. In *Putnam v. Broadway, etc., R. R. Co.*, 55 N. Y. 108, the principle of the foregoing cases seems to have been sustained ; but it was held that where there was nothing in the condition, conduct, appearance or manner of the passenger from which it could be reasonably inferred that he was about to make an attack on a fellow-passenger, the company was not liable for a sudden attack on a passenger.—*Albany Law Journal*, Jan. 16, 1875.

**SETTLEMENT.—Construction—Precedents—Legal personal representatives.**—A fund was settled on A. for life, then on any husband she might leave for life, then on her children, and in default of children on the person or persons who should happen to be her legal personal representative or representatives at the time of her death :—*Held*, that legal personal representatives meant next of kin according to the Statutes of Distribution, and not the executors or administrators. *Semble*, on points of construction precedents may not be cited as authorities, unless they explain the meaning of technical terms or lay down general principles.—*Robinson v. Evans*, 43 L. J. (Ch.) 82.

**PRINCIPAL AND SURETY.—Discharge of surety by discharge of principal in liquidation.**—When a joint and several bond is executed by one of the obligors as surety for his co-obligor, who afterwards files a petition for liquidation under the Bankruptcy Act 1869, and the creditors, without the assent of the surety, duly resolve under section 125 that the debtor's discharge be granted, the surety is not discharged from liability, although the obligee of the bond votes in favour of the resolution, and although there is no reservation of rights against sureties.—*Ellis v. Wilmot*, 44 L. J. Rep., Ex. 10.



**NEGLIGENCE.—Contributory negligence—Child.**—Two children, one five and the other eleven years old, got on the front platform of a horse-car and rode. In attempting to get off, against the remonstrances of the driver, the younger was injured. *Held*, that the driver was negligent in allowing them to ride on the platform, and the company was liable.—*Pittsburg, &c., Ry. Co. v. Caldwell*, 75 Pennsylvania Rep. 421.

**WILL.**—“*Children of my daughter by her present putative husband*”—*Illegitimate child.*—Testator bequeathed moneys in trust after the decease of his daughter for “all the children of his said daughter whether by her present putative husband or by any other person whom she might marry, who should attain the age of twenty-one years, their executors, administrators and assigns. But in case his said daughter should die leaving no issue either by her said putative husband or by any other person, who should attain the age of twenty-one years” then over. Testator at the date of his will knew that his daughter had an illegitimate son by J. B., with whom she was then living, and he recognised this son as his grandchild. After testator’s death, his daughter married J. B., but had no other child :—*Held*, that the illegitimate child was sufficiently designated by the will, and he having acquired a vested interest on attaining twenty-one, and his mother being sixty-seven years of age, that they were entitled to have the fund transferred to them.—*In re Brown’s Trusts*, 43 L. J. (Ch.) 84.

**WILL.**—*Money due at my decease—Unliquidated damages.*—Bequest of “all and every sum or sums of money which may be due to me at my decease :”—*Held*, to pass a sum of money recovered by way of damages in an action by testator’s executor for a breach of covenant committed by a lessee of testator in testator’s lifetime.—*Bide v. Harrison*, 43 L. J. (Ch.) 86.

**WILL.**—*Misdescription of executor—Extrinsic evidence.*—Testator appointed as his executrix “Georgina Geraldine de Bellin,” but there was no person answering to that description. He left a granddaughter named “Adelaide Geraldine de Bellin,” and a great grand-daughter (who was only six months old at the date of the execution of the will) named “Georgiana Geraldine Kate de Bellin :”—*Held*, that extrinsic evidence was admissible to show whom the testator intended to designate by the description “Georgina Geraldine de Bellin ;” and the evidence showing that his grand-daughter, Adelaide Geraldine de Bellin, was the person whom he meant, probate of the will was decreed to her accordingly.—*In the goods of O’Reilly*, 43 L. J. (P. & M.) 5.

**COMPANY.**—*Prospectus—Suggestio falsi—Suppressio veri—Liability of directors—Suit for indemnity by transferee of shares.*—Non-disclosure of material facts, though a ground for setting aside an allotment or purchase of shares, is not a ground for an action for deceit or for proceedings in equity in the nature of such an action (an action of damages). The office of a prospectus is to invite persons to become allottees, and, the allotment having been completed, such office is exhausted, and the liability to allottees does not follow the shares into the hands of subsequent transferees.—*Bedford v. Bagshaw* (29 Law J. Rep. (N.S.) Exch. 59) and *Bagshaw v. Seymour* (29 Law J. Rep. (N.S.) Exch. 60), note ; disapproved ; *Scott v. Dixon* (29 Law J. Rep. (N.S.) Exch. 62), note, and *Gerhard v. Bates* (32 Law J. Rep. (N.S.) Q. B. 364), distinguished, there being in these cases something directly to connect the directors making the false representations with the party complaining that he has been deceived and injured thereby. A purchaser of shares in the open market has no remedy against the promoters, though he bought on the faith of the representations contained in a prospectus not only intentionally concealing material facts, but also containing statements amounting to an active misrepresentation, for which the promoters who signed it would be personally liable either at law or in equity to one who, on the faith of the prospectus, had applied for and obtained an allotment of shares in the company. A person who took no part in the preparation or issuing of the prospectus, but, with full knowledge of all the facts, consented to be a director, and

allowed his name to remain unchallenged at the foot of the prospectus, and signed the memorandum and articles of association which referred to the prospectus, was held as liable as the other directors who prepared and issued the prospectus.—*Peck v. Gurney* (H. L.) 43 L. J., Ch. 19.

**FALSE REPRESENTATION.**—*By advertisement*—*Cause of action*—*Nonsuit*.—Defendant caused to be inserted in a public newspaper an advertisement for the letting by tender with immediate possession "all that farm," &c. (describing it). Plaintiff, believing in the *bona fides* of such advertisement, and desiring to become tenant of a place of the description advertised, was induced to take and did take trouble and incurred expense in going to and inspecting the property, and in the employment of persons to inspect and value it for him, with a view of his becoming tenant thereof. Deft. knew at the time he caused the advertisement to be published that he had not power to let the farm, and in fact the farm was not to be let, and deft. caused the advertisement to be issued to serve some purpose of his own other than that appearing by the advertisement. Upon the above facts, disclosed by the particulars in a plaint in a County Court, the Judge directed a nonsuit, holding that no cause of action was disclosed:—*Held*, upon appeal, that the Judge was wrong, and that he ought to have heard the evidence.—*Richardson v. Sylvester*, 43 L. J. (Q. B.) 1.

**INNKEEPER.**—*Boarders*.—Action against defendants upon their liability as innkeepers for the loss of money brought by plaintiff to their inn. Plt. was not a neighbour or friend of defts., but a traveller, residing at a distant place, who sought their inn for temporary lodging and entertainment. On coming thereto he asked one of the defts. whether they took boarders, and being answered in the affirmative, inquired and was told the price of board by the week, and was thereupon received into the house. His intention, not communicated to defts., was to remain only three or four days:—*Held*, that there was no error in a refusal to instruct the jury that "if plt. was stopping at the hotel under an agreement to board by the week he was not a guest but a boarder, and the common-law liability of an innkeeper for the property of his guest did not apply."—*Jalie v. Cardinal* (Supreme Court of Wisconsin, 1874), *Albany Law Journal*, 16th Jan. 1875.

**LEGACY OF DEBT.**—*Ademption*—*Payment*—*New debt*.—Testator by his will said, "Whereas there is due to me from my son £1440, or thereabouts, secured by bills or notes or otherwise, I release my said son from the payment of any interest up to the time of my death, and I direct that he shall have time for payment of the said sum by paying one-sixth in every year next after my death." He afterwards made a codicil, whereby he confirmed his will. The son paid the debts due at the date of the will, amounting to about £1440, and afterwards incurred fresh debts to the amount of about £1300, which were due at the date of the codicil and at the death of testator:—*Held*, that the legacy was specific, that it was adeemed by payment of the debt, and that the confirmation of the will by the codicil did not give the son any benefit in respect of the debts then due.—*Sidney v. Sidney*, 43 L. J. (Ch.) 15.

**ADEEMED DEVISE.**—*Rents*.—Where a testator had specifically devised certain lands, but such lands were contracted to be sold in his lifetime, so that the devise was adeemed:—*Held*, that the rents received between the death of testator and the conveyance of the property passed to the devisee.—*Watts v. Watts*, 43 L. J. (Ch.) 77.

**MINES REGULATION ACT (23 & 24 Vict. c. 151, s. 10).**—*Neglect of rules*—*Mens rea*.—As a general rule no penal consequences are incurred where there has been no personal neglect or default, and a *mens rea* is essential to an offence under a penal enactment, unless a contrary intention appears by express language or necessary inference. The 23 & 24 Vict. c. 151, s. 10, provides as a general rule to be observed in a coal mine by the owner and agent, that whenever safety-lamps are required to be used in a mine, they shall be examined and securely locked by a person duly authorized. Section 22 enacts, that if any

general rule shall be neglected or wilfully violated by any owner, agent, or viewer, he shall be liable to a pecuniary penalty. Safety-lamps were given out in a mine to which the above Act applied without being duly locked; a competent lampman had been appointed, and there was no personal default in either the owners or the agent of the mine:—*Held*, that the owners and the agent of the mine were not liable to be convicted under the above statute.—*Dickinson v. Fletcher, and same v. Fletcher the younger*, 43 L. J. (Mag. Cases) 25.

**NEGLIGENCE.—Defective highway.**—The plaintiff's horse, driven by his servant in his carriage along a public highway in the exercise of ordinary care, became frightened by the breaking of the carriage in consequence of a defect for which no negligence was attributable to the plt., and ran furiously, throwing out the driver, soon after which he left the highway and passed over private property to and upon a turnpike road, where, still running furiously, he fell over the side of a bridge by reason of a defect in the railing and was injured, such defect being attributable to the negligence of the turnpike company:—*Held*, that the turnpike company was liable for the injury.—*Baldwin v. Greenwood's Turnpike Co.*, 41 Connecticut, 238.

**NEGLIGENCE.—Defective side-walk—Corporation.**—A passage way from a side-walk in a city into the basement of a building was protected by a removable iron grating covered with boards, the iron work being fitted to the opening in such a way that it could not be left in an insecure condition except by gross carelessness. After being in this condition for forty years, during which time it had never been known to be left out of its place, the passage way was used by a stranger, who did not replace the grating properly, and a few minutes after the plaintiff, who was passing on the side-walk, stepped upon it and it gave way, and she was injured:—*Held*, that the city was not liable.—*Littlefield v. City of Norwich*, 41 Connecticut Reports, 406.

**POWER OF APPOINTMENT.**—Shares were settled on trust for such persons as A. might by deed or will appoint. A. took a transfer of the shares into her own name in the ordinary way, executing the transfer under hand and seal:—*Held*, that this amounted to an appointment by A. in her own favour.—*Mailier v. Thomas*, 43 L. J., Rep. (Ch.) 73.

**NEGLIGENCE.—Evidence—Railway company—Level crossing.**—A public footway crossed a railway on a level. The plt., while crossing on the footway in the evening, after dark, was knocked down and injured by a train of the defts. on the crossing. He stated in evidence at the trial, that he did not see the train until it was close upon him; that he saw no lights on the train and heard no whistling. He stated also, that he did not hear any caution or warning given to him by any servant of the company. The driver and fireman of the engine were called in behalf of the company, and stated that there were lamps on the engine and train, which were lighted in due course on the night in question at the commencement of the journey, and which, if lighted, could be seen for a considerable distance by any one standing at the crossing. A porter in the defts.' employ also stated that he had seen the plt. at the crossing on the night in question, and had called to him not to cross. The judge at the trial ruled that there was evidence to go to the jury of negligence on the part of the defts. which caused the injury to the plt.—*Held*, on a bill of exceptions, by Bramwell, B., Mellor, J., Pollock and Amphlett, BB. (Cockburn, C.J., and Cleasby, B., dissenting), that there was no evidence of negligence to go to the jury.—*Ellis v. The Great Western Railway Company*, 9 L. R., C. P. (Ex. Ch.) 561.

**CONTRACT.—Misrepresentation—Avoidance of contract.**—An insurance company purchased Government annuities on the life of T. C., with a statement and declaration that he was born at Barking in 1779, he having, in fact (as was discovered after his death), been born at Brighton in 1786, and T. C. of Barking having died in early infancy. The Act (10 Geo. IV. c. 24) under which the

purchase was made enabled the Commissioners (section 45) to correct, rectify, or amend, any contract or certificate in cases wherein any mistake or accidental error should have been made. The insurance company offered to pay, with interest, the difference between the price they paid and the price they ought to have paid, but the Commissioners desired to treat the contract as void *ab initio*:—*Held*, that they were entitled to a decree on that footing, that the power of rectification in the Act was merely discretionary, and that neither on the general law nor under that power could the company demand a rectification of the contract.—*Attorney-General v. Ray*, 43 L. J. Rep. (Ch.) 478.

## The Scottish Law Magazine and Sheriff Court Reporter.

### SHERIFF COURT OF PERTSHIRE.

Sheriff BARCLAY.

WEDDERSPOON v. MACDONALD—12th January 1875.

*Toll case—Constitution of Clause of Exemption—Sub-lease.*—The following interlocutor explains the circumstances of the case:—

"Perth, 12th January 1875.—This is a claim for '£1, 7s. sterling, being the amount in name of toll-dues, conform to annexed account, unwarrantably demanded by the defr., as tackswoman of Muirhall toll-bar, from the pursuer, at said toll-bar, and paid by him under protest, in respect he, as recognised tenant by Lord Kinnoull of Muirhall farm-house, is exempt from toll-dues at said toll-bar, under articles of let under which the defr. possesses the same, and which she is now called upon to produce, and of which sum of £1, 7s. the pursuer claims repayment.' The particular tolls paid under protest, and now sought to be recovered, are understood to have been exacted for a gig or some such vehicle.

"The facts are, the defr. is lessee of the toll-bar at Barnhill, with a side bar at Muirhall, for the year running from Whitsunday last to that term next. In the articles of roup there is a clause containing many exceptions from toll-dues. The one founded on by the pursuer is in these words, 'as also the tenants of the lands of Muirhall, the property of the Earl of Kinnoull.'

"Mr. Walker for some years has been tenant of Muirhall; but being also tenant of the neighbouring farm of Gannochy, where he resides, he sublet the farm-house on Muirhall to the pursuer since Martinmas 1869. Mr. Walker not being bound to reside on the farm, Lord Kinnoull has acknowledged the pursuer as sub-tenant in the farm-house.

"The defr. for three years compounded with the tacksman for £1 in the year to pass toll-free at Muirhall bar; but believing he came under the clause of exemption, he afterwards paid the tolls forming the subject of the present action under protest, and now sues for repetition and to have the point settled.

"As a general rule clauses of taxation and restrictions receive in law a severe interpretation, while privileges admit of a liberal reading, yet the latter should never be abused so as unjustly to admit others than the really privileged, and so unjustly restrain claimants from their proper rights.

"There is no questioning but that the pursuer is 'a tenant of the lands of Muirhall,' and the only occupant of the dwelling-house. It will be observed the exception is not *personal* to Mr. Walker by name, but the words are in the plural, 'tenants,' and the subject exempted is 'land,' not 'farm.' Had Mr. Walker himself possessed the house he would have had the right to pass with his gig as well as with his agricultural carts. Therefore, now that that gentleman is not in possession of the farm-house, but the pursuer is so, the excepted

lands of Muirhall do not enjoy a greater privilege, nor is the burden more severe on the road or the toll-gatherer than were Mr. Walker in possession of both house and lands, and not the pursuer. The only difference is where Mr. Walker may drive from Gannochy to Muirhall, which must be to a very limited extent, if at all.

"These exemptions from toll are generally given for some substantial reason, founded on grants of ground for the formation of the road or erection of the toll-house, or that the adjacency of subjects to the toll-bar renders it necessary to give greater freedom than to more distant tenants—a reason recognised in all Highway Statutes. It is unnecessary to speculate—as was done in the argument—as to the possibility of the lands of Muirhall becoming a colony. Such an event, if it does occur in the future, is likely to have its origin in some more substantial causes than having the very insignificant immunity from tollage. Besides, the let of the tolls is annual, and therefore any such increase of population may be met by an abolition or limitation of the exemption.

"The pursuer will have decree of repetition, but as the case was brought to settle, and has settled the point for the future, no costs are given.

"HUGH BARCLAY."

#### SHERIFF COURT OF LANARKSHIRE.

Sheriffs DICKSON and GUTHRIE.

BULLOCH, LADE AND CO. v. CHARLES AND DAVID GRAY, *et contra*.—Jan. 6, 1875.

*Trade Mark*.—Bulloch, Lade & Co., distillers, Camlachie, brought a petition against Charles & David Gray, and Archibald Walker, sole partner of said firm, for interdict against the respondents using the word Loch Katrine on labels affixed to bottles of whisky, or on casks of whisky distilled by them, or on invoices of such whisky, or from representing their whisky as distilled at the Loch Katrine Distillery, or selling it as distilled there, etc. They averred that their distillery at Camlachie had been for about seven years called and known as the Loch Katrine Distillery, and that they had used the name Loch Katrine Distillery as a trade mark on their labels, casks, etc.

The respondents, C. & D. Gray, averred that the name Loch Katrine Distillery was a colourable imitation of their trade mark "Loch Katrine Malt Whisky," which they had adopted on 17th February 1865, and since used: and they brought a petition for interdict against Bulloch, Lade & Co. from using the words "Loch Katrine" as applicable to or descriptive of the whisky of the respondents (B., L. & Co.'s) manufacture, and the distillery where the same is manufactured or distilled by them, and from selling or causing to be sold any such whisky as having been distilled at the Loch Katrine Distillery, etc.

The petitions were conjoined, and a long proof led. The S.-S. pronounced the following interlocutor:—

"Finds that the party Bulloch, Lade & Co. have been distillers at Camlachie, Glasgow, since 1854, and that the party Charles & David Gray, or a firm bearing the same name, have been distillers at the Adelphi Distillery, Muirhead Street, in the parish of Gorbals, Glasgow, from a date prior to 1831: Finds that when the water of Loch Katrine was introduced as the ordinary water supply of the city of Glasgow in 1860, or immediately thereafter, it was supplied to Bulloch, Lade & Co., and has since been continuously supplied to them, for the purposes of their distillery, no other water being used by them as an ingredient of their whisky: Finds that in the same or in the next year, two other distilleries in Glasgow obtained a supply of Loch Katrine water: Finds that Bulloch, Lade & Co. immediately began to recommend their whisky as being made with Loch Katrine water, and that it was from that time frequently called Loch Katrine whisky or 'Loch

Katrine' by their travellers and customers, as indicative of the water with which it was made, although it was not so called in their advertisement-books, invoices or orders: Finds that C. & D. Gray first got a supply of Loch Katrine water for their said distillery in December 1864 or January 1865, and that in June 1867 they obtained an additional supply, and thereafter used it in every process of the manufacture of their whisky: Finds that from the beginning of 1865 C. & D. Gray described the malt whisky made at their said distillery as 'Loch Katrine Malt Whisky,' or 'The Famed Loch Katrine Malt Whisky,' in their invoices, advertisements, circulars, books and letters, intending thereby to indicate that it was made with water from Loch Katrine: Finds that on or about 1st August 1867 they issued a circular, No. 7-1 of process, in which they styled themselves 'Sole Distillers of the Famed Loch Katrine Malt Whisky,' an assertion which was challenged by Bulloch, Lade & Co., and which gave rise to an angry correspondence, in which Bulloch, Lade & Co. did not challenge the right of the other parties to call their whisky by that name, but merely their right to assert that they were the sole distillers of such whisky, and in which Charles & David Gray maintained their right so to style themselves, on the ground that the words 'The Famed Loch Katrine Malt Whisky,' or 'Loch Katrine Malt Whisky,' constituted their trade mark or brand: Finds that in December 1867, immediately after said correspondence, Bulloch, Lade & Co. issued a circular, No. 8-4 of process, intimating that all whisky made at their distillery at Camlachie would thenceforth be sent out in casks bearing their brand 'Loch Katrine Distillery, Camlachie,' and that they have since continued to style their distillery the 'Loch Katrine Distillery, Camlachie,' in their circulars, invoices, books, letters and advertisements: Finds that C. & D. Gray caused their distillery to be called in the Glasgow Directory of 1867-8 and 1868-9, the Loch Katrine Adelphi Distillery, in imitation of an entry made by Bulloch, Lade & Co. in the Glasgow Directory of 1866-7, of their distillery as the 'Camlachie (Loch Katrine) Distillery,' and some time after, and at all events about July 1870, began to call their distillery the Loch Katrine Distillery, or the 'Loch Katrine Distillery Adelphi,' or the 'Loch Katrine Adelphi Distillery,' although their said distillery continued to be known and called by them and others also by its former name of the Adelphi Distillery: Finds that the name 'Loch Katrine Whisky,' or 'Loch Katrine Malt Whisky,' is, and was in 1865, understood in the trade to mean whisky made with Loch Katrine water, and that being thus descriptive of whisky so made by the parties and other distillers, it could not be appropriated as a trade mark, and was not so appropriated by the petitioners C. & D. Gray: Therefore refuses the prayer of the petition at their instance: Finds for a similar reason, and with reference to the note, that the name Loch Katrine Distillery cannot be appropriated, and has not been appropriated, as a trade mark by Bulloch, Lade & Co.: Therefore refuses the prayer of the petition at their instance, finds no expenses due, and decerns.

"*Note.*—It is not doubtful that Loch Katrine whisky, as the phrase has been used by both parties and in the trade generally, describes, and has always been intended to describe, whisky made with the water of Loch Katrine. This is really conceded in much of the evidence adduced for Messrs. Gray, on whose behalf, however, a different view is maintained in argument, and it is so reasonable, natural, and probable in itself, looking to the notoriety throughout Scotland of the fact that Glasgow has since 1860 been supplied with water from Loch Katrine, that the evidence of a peculiar class of witnesses, who say that they regarded it as a mere fancy name, seems to deserve little attention. There is no reason for thinking that these witnesses have been schooled; but they seem to have been elected with a judicious regard to their mental peculiarities, and the state of their information as to Loch Katrine and the water supply of Glasgow.

"This being so, it is the right of every one who makes whisky with that water, or sells whisky so made, to call it Loch Katrine whisky, in accordance

with a well-established rule, that name cannot be appropriated by any manufacturer as his trade mark. It is sufficient to refer upon this point to the cases of *Young v. Macrae*, 9 Jur., N. S. 322; *Amoskeag Manufacturing Co. v. Spear*, 2 Sandf. S. C. 599; and *Cox's Amer. Trade Mark Cases*, 87; *Town v. Test*, Cox, 514; *Raggett v. Findlater*, L. R. 17 Eq. 29. The case of *M'Andrew v. Bassett*, referred to in support of the opposite contention, goes further than any other case does in admitting the appropriation of a geographical name, and it seems not to touch the present case, because—1. The word 'Anatolia' used there was a foreign term really conveying no meaning to the ordinary purchasers of the liquorice on which it was stamped (see per Malins, V.C., in *Raggett v. Findlater*, *cit.*); 2. Because there was no attempt there to show (as has here been done) that the word in question had been used by the defts. or by any other manufacturer before its adoption by the plt., but on the contrary the defts. were clearly shown to have taken it directly from a stamp on the goods of the plts.; and 3. Because the term in question does not seem to have been necessary or in general use to describe the quality or origin of the liquorice.

"The case of *Seizo v. Provezende*, L. R. 1 Ch. Ap. 192, also cited for Messrs. C. & D. Gray, is a very special case, where the geographical name was also the name of the plt., and there was patent fraud on the part of the defts. As regards the interdict claimed by Bulloch, Lade & Co., an attempt was made to show that they were barred from any remedy in a court of law by having fraudulently used the brand *Islay Malt* on their casks. The S.-S. cannot give effect to this contention, because he thinks that this brand did not deceive purchasers, and was not intended to do so, and because it was disused by Bulloch, Lade & Co. before, or at the time, when the trade mark in question was adopted. It forms no part of the trade mark, and a merely collateral misrepresentation does not disentitle a party to relief in a court of law or equity (*Ford v. Foster*, L. R. 7 Ch. 711, and 41 L. J. Ch. 682).

"The question whether Bulloch, Lade & Co. are entitled to be protected in the exclusive use of the name 'Loch Katrine Distillery,' which they were the first to adopt, is attended with some difficulty. The words 'Loch Katrine Whisky,' in any form in which they occur in the present case, cannot, as has already been pointed out, become a trade mark, because they may be employed by any one of the public who makes whisky with Loch Katrine water, for the purpose of describing his goods, with as much truth as by the present parties, and therefore with equal right. They are not words which either themselves or by their proved use have come to denote that the whisky is distilled by Messrs. Gray, and by them only. It may, however, be contended with some force that the case is different when these words are applied to the place where a certain manufacture is carried on. If a manufacturer chooses to call his works by a name that has some reference to the kind or quality of the goods manufactured there, it may be fairly argued that he brings himself within the general principle which lies at the foundation of all trade-mark law. That principle is, that a trader who adopts a name or device not already appropriated to designate an article as his, shall not be deprived of the benefit of it by another, who applies to his productions the same name or mark, or a colourable imitation of it, so that the public are, or may be, deceived or misled into purchasing the goods of the one, supposing them to be the goods of the other. While it is proved that 'Loch Katrine Whisky' means generally any whisky made of the water of Loch Katrine, it may be plausibly argued that in December 1867, and for some time after, whisky marked as being made at Loch Katrine Distillery could not be taken for whisky made by any distillery but Bulloch, Lade & Co's, and therefore they could legitimately adopt that name as a trade mark, and ought to be protected in the use of it. There are however considerations which tend to a different result in this part of the case, and which, as the S.-S. has come to think, are of greater weight in the present circumstances. To give one manufacturer an exclusive right to call his work by the name of the article which he sells, or by a distinctive epithet by which it is known, may give him an unfair advantage over other dealers, who have the

same right as he to call their productions by that name or epithet ; because it will naturally tend to lead the public to believe that the manufactory so designated is that where the original or the best article of the kind is produced. There is no express decision negating the right to such appropriation of a name. But if the Messrs. Gray are not entitled to an exclusive use of the descriptive term 'Loch Katrine' in connection with their whisky, it seems to follow almost necessarily that Bulloch, Lade & Co. cannot appropriate the same term as the designation of their distillery. If they could do so it would be very nearly equivalent to allowing them to appropriate the term Loch Katrine whisky as a trade mark, which has been denied in this judgment to the other party, and it would be almost the same as if in the leading cases on this subject the parties who were refused the right to the exclusive use of the terms 'Paraffine Oil' and 'Nourishing Stout,' had been permitted to call the places where these articles were manufactured 'The Paraffine Oil Works' and 'The Nourishing Stout Brewery,' and secured by injunction in the exclusive right of branding these local names on their casks."

On appeal, the Sheriff adhered to the S.-S.'s interlocutor :—

"*Glasgow, 6th January 1875.*—Having heard parties' procurators at great length on the cross appeals, and considered the record and written and parole proof : For the reasons stated by the S.-S., adheres to the interlocutor appealed against, in so far as it refuses to grant interdict at the instance of C. & D. Gray against Bulloch, Lade & Company *quoad* the application for interdict by Bulloch, Lade & Company against C. & D. Gray, for the reasons stated by the S.-S., and also in respect the latter firm had been in use to apply the name 'Loch Katrine' to their whisky for a considerable time before the former applied it to their distillery : Finds that Bulloch, Lade & Company could not and did not acquire right to the said name as a trade mark for their distillery : Therefore adheres to the interlocutor as regards the said application, adheres thereto also as regards expenses, and decerns.

W. G. DICKSON.

"*Note.*—The Sheriff concurs so fully in the able and exhaustive judgment of the S.-S. that he need only notice the chief points in the case. On record each of the parties charges the other with using the name 'Loch Katrine' in order to share the benefit of that party's reputation. Without such an averment neither of the petitions would (it is thought) have been relevant. But on the proof there is nothing to show that either of the rival firms ever endeavoured to pass off its goods as the goods of the other, or to share the benefit of the other's reputation. The real contention between them is for the sole use of the name 'Loch Katrine,' as indicating the fact—regarded by each as important—that the whisky which that firm distils is made with Loch Katrine water. It is clear, moreover, that each firm assumed the name on account of that fact, and that each intended to use, and did use, the name as a means of recommending its whisky to the public as specially good in quality on account of that fact. It is also clear that the name is appropriate for that purpose ; and that, partly on that account and partly from the way it has been used by both firms, it is understood by the public and the trade to import the use of Loch Katrine water as an ingredient. The name is thus really and aptly descriptive of a certain class of whisky, and it is ancillary to the recommendations by the travellers for the respective distillers, and to their advertisements of the quality of their goods. Indeed, such a use of the name was natural and almost inevitable upon the fact which it was intended to indicate becoming recognized as important. And, accordingly, several years before the name had been used by Bulloch, Lade & Company for their distillery, or by C. & D. Gray for their whisky, the travellers and customers of the former had applied it to that party's whisky. That the name is meaningless, except as descriptive, is still further clear, from the circumstance that both parties substituted it for that by which their respective distilleries and whiskies had been known and distinguished previously by way of trade mark. The case is therefore essentially different from those of *M'Andrew v. Bassett* and *Wotherspoon v. Currie* (cited in the note



to the S.-S.'s interlocutor), on which Messrs. Gray's agent founded, for in the one the name 'Anatolia' and in the other the name 'Glenfield' were almost unknown, except in connection with the liquorice and starch to which they had been applied; and neither name was regarded as involving in itself any description or recommendation of the article. Moreover, in each it had been assumed by the defts. in order to deceive the public and to pass off the defts.' goods as the plts.' These cases were decided on the ground that the defts. had used names to which the plts. had given celebrity in connection with their goods, but which in itself did not describe them; whereas here each party wishes to secure the name 'Loch Katrine,' on account of its appropriateness as describing their goods by a celebrated ingredient. Still less can this case be assimilated to *Seixo v. Provezende*, noticed by the S.-S., where the name "Seixo" was protected as the plt.'s trade mark, having been assumed by him on account of its being both his own name and that of the estate from which he took his title. The case, however, comes within the principle of *Raggett v. Findlater*, cited by the S.-S., where Sir R. Malins, Vice-Chancellor, refused to prohibit the use of the name 'Nourishing Stout' by one dealer in malt liquor in an action at the instance of another who had previously used it. The case *Lee v. Haley* (5 Law Reports, Clause 155), as explained by Sir R. Malins in the case of *Raggett v. Findlater*, is also in point. 'In that case (says the learned judge) the trade mark was "the Guinea Coal Company;" that is descriptive of the quality of the coals, because the Guinea Coal Company meant the Coal Company which sold coals at a guinea a ton. My judgment, and the judgment of Lord Justice Giffard who affirmed me, go upon the same principle that the deft. was entitled to sell his coals as the Guinea Coal Company, because he did sell at a guinea a ton; but nothing would satisfy him but going to Pall Mall, where the plt. carried on business, and calling himself "The Guinea Coal Company, Pall Mall." This was calculated to deceive, and did deceive, customers of the original company; and it was restrained accordingly.' The learned Vice-Chancellor concludes thus:—'My opinion is, that for the protection of the public it is necessary a trade mark should be something beyond a mere English word denoting quality.' The same principle is illustrated by the case of *Cooks v. Phandler* (11 Law Report, Eq. 446, as noticed in *Raggett v. Findlater*). It was urged for Bulloch, Lade & Company that while 'Loch Katrine,' being descriptive, cannot be monopolized by C. & D. Gray for their whisky, it may be so by Bulloch, Lade & Company for their distillery. But no authority was adduced in which such a distinction was recognised. The Sheriff concurs with the S.-S. in considering it erroneous. If all persons who make whisky with Loch Katrine water may call their whisky 'Loch Katrine Whisky,' surely they may describe their distillery by the same name, as indicating that the goods are manufactured there; and no one of them is entitled to a monopoly of the name, which is equally applicable to all. If Messrs. Gray could have claimed exclusive right to the name for their whisky, it can hardly be disputed that Bulloch, Lade & Company might have been prohibited from using it for their distillery, on account of that being a colourable imitation of one to which their rivals had acquired right. And the same principle, it is thought, must apply *e converso*, the name being one which cannot be monopolized for the manufactured article. If, as explained by Vice-Chancellor Malins, the name 'Guinea Coal Company' could not have been appropriated, on account of being descriptive of the goods which the companies sold, no more may the name 'Loch Katrine Distillery,' if 'Loch Katrine' is descriptive of the goods which are there manufactured. Besides, it is as the trade-mark for their whisky that Bulloch, Lade & Company claim the name 'Loch Katrine' for their distillery (Cond. 1 in *Bulloch, Lade & Company v. C. & D. Gray*). This excludes the distinction which their procurator attempted to draw. Accordingly, the Sheriff considers that neither of the rival firms is entitled to a monopoly of the name 'Loch Katrine,' as applied either to the spirits which it distills or to its distillery. It was urged for Bulloch, Lade & Company that effect cannot be given to this view as regards their distillery, because it is not

only not pleaded by C. & D. Gray, but is inconsistent with their whole case, which is based on 'Loch Katrine' not being a descriptive name. This is thought to be a narrow view of the pleadings in which Messrs. Gray deny Bulloch, Lade & Co.'s right to the name, although, from the nature of Messrs. Gray's own case, they did not do so, for the reason on which the S.-S. has proceeded. But, whatever may be said as to this, Messrs. Gray have sufficiently pleaded that their prior use of the name for their whisky excludes Bulloch, Lade & Co. from right to it as a trade mark for their distillery. On the point of *mora* there is no doubt that Messrs. Gray objected in correspondence to Bulloch, Lade & Co. calling their distillery 'Loch Katrine' (see their letters of 19th and 26th August 1867, in No. 8-1 of process). That is enough to bar any plea of laches or *mora*. W. G. D."

This judgment has not been appealed.

Act.—*Naismith*.—Alt.—*G. R. Young*.

### SHERIFF SMALL DEBT COURT OF LANARKSHIRE.

Sheriff GUTHRIE.

ROBB v. M'GREGOR.—March 12, 1875.

*Turnpike Acts—Additional Toll for Overweight*.—The following judgment explains the case :—

"This action is brought for repetition of a portion of the toll-duties paid at Sandyford toll on two-horse lorries belonging to the pursuer from May to September last. These toll-duties amounted to 1s. 10d., 4d. being the toll leviable according to the table, on two horses drawing a carriage of this description, and 1s. 6d. being the sum leviable on the lorry, in respect of its wheels being less than a certain breadth and its weight with loading being above 35 cwt. The pursuer claims repetition of the 4d. paid in each of the cases enumerated in the summons, on the ground that the statute, properly construed, authorizes the exaction of only one of these rates, viz. the rate upon carriages for narrow wheels, that rate when leviable superseding and coming in place of the other.

"The question depends on the construction of the 9th and 11th sections of the Local Act 8 & 9 Vict. c. 195, which is certainly as ill-expressed and unintelligible as most Road Acts are. By the 9th section tolls are imposed upon beasts of all kinds passing through toll-gates, and upon wheelbarrows and similar machines, whether drawn by man or beast. It authorizes the trustees, *inter alia*, to take the following toll-duty :—

"'For every horse or other beast of draught, if not more or less than two in number, drawing any waggon, van, cart, sledge, or other such carriage, the sum of 4d. sterling.'

"The toll actually imposed by the existing table is, however, only 2d. per horse. The 11th section is as follows (leaving out plainly superfluous words) :

"'And whereas much damage is done to the said roads by carriages carrying great weights drawn upon narrow wheels, and it is reasonable that such carriages should pay toll in proportion to their weight ; be it therefore enacted, That the said trustees shall and may . . . cause to be levied . . . before any horse, cattle, or other beast drawing any waggon, wain, cart or other carriage, the felloes of the wheels of which shall not be of a flat surface and measure four inches in breadth at least, if one horse, cattle or other beast be drawing such waggon, etc., and six inches, if two or more horses, etc. be drawing the same,—shall pass through such turnpike or turnpikes, gate or gates, the weight of which carriage, with the burden or loading therein, shall amount to 20 cwt., and shall not amount to 25 cwt., the sum of 6d. sterling,' and so on, concluding thus, 'and where the weight of such carriage with the burden or loading therein shall amount to 35 cwt. or upwards, the sum of 1s. 6d. sterling.'

"The first observation I make is, that, *prima facie*, the 4d. is a duty or rate upon the horses, and the 1s. 6d. is a duty or rate on the carriage. The distinction between a toll upon the horse and a toll upon the carriage is a familiar one in the law of turnpikes, being the basis of many decisions in regard to liability for tolls in returning on the same day. Here the 9th section imposes tolls upon beasts of draught differing according to the number employed in drawing any carriage, and also according to the nature of the carriage. The 11th appears, though perhaps not so distinctly, to lay the toll upon the carriage. It says that it is reasonable that 'carriages' carrying great weights 'should pay toll,'—an inaccurate but sufficiently expressive phrase, and the road trustees are directed to levy, before any horse drawing a waggon of the narrow-wheeled kind described in the section shall pass through a turnpike gate, 6d. if the carriage and burden weighs 20 to 25 cwt., and so on, rising to the maximum of 1s. 6d.

"The absence of the epithet additional or the like before the word toll in the inductive part of the section would be a material point in favour of the pursuer, if any toll had already been imposed by this statute on carriages or waggons of this kind. But no such toll has been imposed; and therefore the word would have been out of place. It may be contended that the words 'before any horse, etc. . . shall pass'—bringing the horses into connection with the subject-matter taxed in this 11th section—really serve the same purpose, and show that this is an additional and not a substitutional toll-duty. But it seems to me that these words merely point to the time at which the toll-duty shall be payable, for it is not an uncommon provision in Turnpike Acts that all tolls shall be exigible and paid before the horse or other beast of burden to which they apply shall pass through the turnpike gate. If they have any meaning beyond this, they do not seem to imply that the horses shall be allowed to pass in respect of the toll imposed here, but they rather imply that the horses shall not be allowed to pass, *although* the toll exigible for horses under sec. 9 be paid, *unless* the toll on heavy weights imposed by this section be also paid.

"While the true construction of the *words* of the statute appears to be what I have stated, the slightest consideration shows that the purpose of the 11th sec. would, in many cases, not be attained if it were construed as the pursuer argues. For instance, a four-horse waggon would pay more under the 9th section than it would under the 11th, whether its weight when loaded was under or over 35 cwt.

"I think, therefore, that the defrs. are entitled to levy toll-duties, as they have been doing, under section 11th, in addition to those leviable under section 9th, and they will therefore be assoilzied."

*Act.—D. Hill.—Alt.—C. D. Donald, Jun.*

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THE

# JOURNAL OF JURISPRUDENCE.

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## CHIEF JUSTICE DENMAN.<sup>1</sup>

TWENTY years have passed away since the death of Lord Denman awakened the muse of Dr. Kenealy, then a barrister and poet. But the life of this eminent judge has only recently been given to the public, written by a brother lawyer, an ardent admirer, and one evidently fitted for the work which he has undertaken. It is not however our intention to enter into any criticism of the book itself, but merely to offer the readers of the *Journal* a slight sketch of Denman's career, which is one not without interest to all who concern themselves with legal reforms.

Thomas Denman was born on the 23rd of February 1779, in London, where his father, Dr. Denman, was established in good practice as a medical man. By his mother he was of Scotch descent, she having been a Miss Brodie, connected with the Brodies of Brodie, and an aunt of the celebrated Sir Benjamin Brodie.

His first experience of education was under the guidance of Mrs. Bazbauld, at a superior kind of dames' school kept by her at Palgrave, in Norfolk. He went to Eton in 1788, and entered St. John's College, Cambridge, in 1796. At the university we are told he devoted himself with considerable success both to scholarship and general literature. But he seems to have had a holy abhorrence of other branches of study, as his "Verses in Dispraise of Mathematics" shew. He longed for an active career, and turned with disgust from studies which he thought would be of no use to him in after life. Accordingly he left the university unadorned with its honours, and at once devoted himself to preparing for that profession which he had chosen.

He seems to have had a good training in the chambers of several eminent lawyers (amongst others of Tidd, whose "Practice"

<sup>1</sup> *Memoirs of Thomas, first Lord Denman*, by Sir Joseph Arnold. Two vols. Longmans.

called forth such eulogies from Uriah Heap), and in 1803 he started as a special pleader on his own account. The next events in his career which fall to be noticed are his engagement and marriage, the lady of his choice being a Miss VEVERS, of Leicestershire, to whom he was united in 1804. For a short time he struggled on as a special pleader, writing occasionally to the *Monthly Review*, but leaning we suspect mainly upon his father, the doctor, for support. He was admitted a member of Lincoln Inn in 1806, and went the Midland Circuit. Sir Joseph ARNOLD has enlivened his work by one or two interesting particulars relating to Denman's circuit experiences. Both as a barrister and afterwards as a judge, he seems to have enjoyed above all things these professional tours, and the interesting, though often hard work, varied as it was by pleasant excursions, festive gatherings, and meetings with old friends. It seems to have been a custom amongst the members of the Circuit mess to impose fines for misdemeanours, as the following entries from the Circuit-book will show :—

"1807, *July 14, Lincoln*.—Mr. Denman was presented for wearing nankeen trousers at a Circuit court."

"1810, *August 20, Leicester*.—Mr. Denman presents Mr. REYNOLDS for dancing with seven attornies' daughters at Derby ball—one guinea."

"Also Mr. Holt for travelling the Circuit in stage-coaches and without a servant—one guinea."

And not only for misdemeanours, as, for example, in these extracts of later date :—

"*Summer Assizes, 1816*.—Mr. Denman congratulated on a puff from the judge: 'One comfort is, your defence cannot be in better hands'—one guinea."

"*Derby*.—The Attorney-General (*i.e.* of the Circuit) presents Mr. Denman for the horrible and merited applause which he received in Court at Nottingham."

As a rising young Liberal barrister, Denman soon came to be employed in cases of a political interest, in those days so numerous and exciting. His first retainer in London was on behalf of Lord COCHRANE, at his election trial. The occasion above referred to at Nottingham was that of the trial of the Luddite prisoners, who were defended by Denman upon a charge of machine-breaking and rioting. In 1817 he appeared before the special commission at Derby for Brandreth and others, charged with levying war against the King. This was one of the cases which arose out of the miserable state of the country, suffering from bad harvests and other evils. There had been an insurrection, and Brandreth was one "who had committed murder in the insurrection." Denman had to contend against the charge of levying war, which indeed seems to have been an absurd one, originated by the pompous and despotic rulers of that day. Brandreth and his friends however were,

in spite of a brilliant defence, convicted, hung and beheaded. But the clemency of the Prince Regent dispensed with the quartering.

Denman's political career began in 1818, when he was returned to Parliament for the close borough of Wareham. Long afterwards, during the fierce discussions over the first Reform Bill, he confessed with shame that he had not had virtue to resist the temptation which this borough had put in his way. He did not however represent it long, being returned in 1820 for Nottingham, of which town he had been the deputy-recorder. He joined the Whig opposition, but recently weakened by the death of Horner and Romilly, and of which the then leading men were Tierney, Macintosh and Brougham. Like many others distinguished in the legal profession he failed to take (at all events at first) a high place in the House of Commons. At that period the position of a reformer, and especially of a legal reformer, must have been far from encouraging. The abuses calling for reform were numerous and great, but the strong and steady opposition of the Government rendered the hope of their removal a very forlorn one. Time after time were attempts made to get rid of evils (which now seem to us to have been so obvious and great), attempts which only ended in signal failures. About such great matters as Catholic emancipation and Parliamentary reform, agitators could gain support or at least sympathy from the nation at large, but to fight for the removal of legal abuses is a work the magnitude of which the public too often fails to see, and about which it is indifferent.

At that time (and we are sorry to say for long after) there existed that most monstrous anomaly of English law, by which persons accused of felony were deprived of the assistance of counsel. For the removal of this abuse Denman worked in Parliament, as did Sydney Smith through the *Edinburgh Review*. In 1824 Mr. Lamb's motion for leave to bring in a bill upon the subject was rejected by a majority of thirty, while two years later, upon a second attempt being made, the encouragement which it met with was a rejection by a majority of sixty-nine. Upon this last occasion Denman put the case of a member of the honourable House upon his trial for felony, and obtaining a bitter experience of the evil complained of. Sydney Smith had in the *Edinburgh Review* suggested that some member, "we ask but one," should be patriotic enough to commit an act of felony in order that he might feel himself, and prove to the world at large the inconvenience of being deprived, under such circumstances, of counsel's assistance. It is almost incredible, but this anomaly was actually not removed until ten years later, when even Lord Lyndhurst had become convinced of the necessity of reform, and moved the second reading of the Bill.

Another reform for which Denman fought earnestly was the reduction of the immense number of offences which were at that time capital. Accordingly he supported Sir James Macintosh's

Bill for the abolition of death-punishment in cases of forgery, introduced in 1821. In spite of the moderation of that proposed measure (excepting as it did cases of forgery of bank-notes), it was rejected by a majority (although narrow), led by that eminent statesman Lord Castlereagh. It fell to Denman afterwards, in 1837, to carry through the House of Lords two bills, one abolishing death-punishment in *all* cases of forgery, and the other greatly reducing the number of capital offences. How great that number must once have been, may be realized by the fact that in 1823 Acts introduced by Peel abolished the punishment of death in nearly one hundred cases where it had formerly existed. The opposition with which such reforms had to contend is forcibly brought before us by Denman, writing in the *Edinburgh Review*. He is speaking of Romilly, who had preceded him in his work as a law reformer.

"His projects were assailed by the whole tribe of ministerial lawyers in Parliament, from the Lord High Chancellor down to the meanest candidate for a Welsh judgeship. The twelve judges of England stepped down from their pedestals, and through Lord Ellenborough, then Chief-Justice of England, favoured the House of Lords for the first time with an unasked opinion respecting a matter not of law, but of legislation, protesting against any abridgment of their powers of life and death. The motion was annually renewed, but supported by minorities in point of numbers contemptible, and one single measure of mitigation was alone effected in the lifetime of the author of the reform,—the abolition of death-punishment for the offence of stealing from the person."

But not only in criminal procedure were there calls for reform. The Civil Courts were far from perfect. The judges were overpaid—their work improperly distributed—their amount of patronage excessive. We can comprehend the conservatism of some of the men in power in these days when we discover how much they were in danger of losing. The jobbery and corruption which they defended secured to them what it was indeed hard to lose. Until 1825 the Chief-Justices derived large sums from the sale of offices. In the discussions in Parliament in that year, it was stated that Chief-Justice Eyre had, in this way, during the time he held office, obtained £30,000. There were also pleasant sinecures. Lord Ellenborough, in addition to his £9000 of salary as Chief-Justice, derived £7000 as Chief-Clerk, an office which he afterwards, when tired of it, handed over to his son. Even in 1825, while professing to make reforms, the Government gave to each puisne judge £6000 a year, while to the Chief-Justice of the King's Bench was awarded £10,000. And yet these were days in which money was scarce and went a long way. The arrears of work in the Court of Chancery under Lord Eldon formed an evil against which active and liberal-minded lawyers called out strongly. Denman supported a motion in 1823, which had for its object an

inquiry into the state of matters in this Court. In doing so he gave one or two instances of the evil complained of. One case, involving a matter of £10,000, had been in Court nine years, and had stood at the top of the paper for two years and a half. After "the infant" concerned had broken his heart and died, the solicitor, on the ground that he had "to contend against the bitter feelings of his relations," wrote privately to Lord Eldon, who, filled it is said with compunction, at last gave judgment. In another case, after his Lordship had heard counsel, he took it (as we would say) to *avizandum*. Six years afterwards, being pressed by the parties for a decision, it turned out that he had entirely forgotten the circumstances, and a fresh argument was rendered necessary. But although it was quite obvious that something was wrong either with the judge or with the system, the motion made at this time for inquiry was rejected by a majority of 85.

We have naturally dwelt upon Denman as a legal reformer. We need however hardly say that as regards the still greater questions of the day, his position was that which became the friend of Macintosh and Brougham. Ten years after entering Parliament, and looking back upon his career, he could say, "I did my best for the interests of freedom, justice and truth in every part of the world. For every species of reform—Parliamentary, legal and economical—I constantly lifted up my voice; to every corruption and abuse I declared the enmity I felt." It may be easily guessed what with these political views his professional career was,—years of comparative obscurity, with every office denied to him, to be followed by promotion and honours when such Tory despotism had come to an end for ever.

Shortly after entering the House of Commons, and while still a comparatively obscure barrister, Denman was called upon to undertake a duty which undoubtedly was the means of setting him on the road to professional distinction and honours, although at the time it brought down upon him the wrath of his King and the frowns of the Ministry. He was informed one day by Brougham that a general retaining fee would be left at his chambers for the Princess of Wales, which accordingly was, as he tells us, "brought in a mysterious manner by a clerk from Coutts." Brougham was the leading counsel for that unfortunate Princess. He was much opposed to the plan which she had formed of leaving the Continent and coming to England. But the extreme measures which her husband, then just ascending the throne, was taking against her, strengthened her determination to visit London. Accordingly, in June 1820, she entered that city amid the shouts of the multitude, who hated the King, and therefore took her innocence for granted. It is well known how the ill-advised Ministry pushed on the inquiry into her conduct. Attempts were made to effect some compromise—Brougham and Denman acting as the Queen's representatives,—the former having been made her attorney, and the latter her solicitor-general. But their client would not listen to



any compromise which should give to her husband a virtual triumph. An account of his connection with this celebrated case, written by Denman, has been preserved, and is well worthy a perusal. His speech before the Lords upon the conclusion of the evidence was much admired; at the time, indeed, it was thought to excel in eloquence even that of Brougham. It was certainly bold, and rendered any prospect of promotion from the King's party quite hopeless. One unfortunate classical allusion made the Sovereign his enemy for life. He wound up his reference to the imputations and slanderous rumours which the Duke of Clarence had circulated against his client, by exclaiming in a voice that caused the old roof of Westminster to ring again, "Come forth, thou slanderer, and let me see thy face." But if kings and royal dukes became his enemies, the people were his friends. Amidst the general rejoicings and illuminations which the virtual triumph of the Queen called forth, her counsels' services were not forgotten; the city of London passed votes of thanks, and conferred upon them the freedom of the city, and shortly afterwards Denman was elected by the Common Council of London their Sergeant. Curiously enough, the very first case which he had to try was one prosecuted by the Constitutional Association, and the prisoner having been found guilty, received a severer sentence than was expected by the public, looking to Denman's well-known political views. Thus for a number of years he was called upon to fulfil the duties of the judge as well as of the barrister.

The wrath of the King, incurred, as we have already explained, exhibited itself in no more formidable way than in a persistent refusal to confer upon Denman the "silk" to which his position at the bar now fairly entitled him. After twenty-two years of practice he was still in a "stuff gown," and the matter was getting serious. For a long time he was under the impression that he owed this want of promotion to the influence of such Tories as Eldon and Lyndhurst. In 1828, however, he learned what the real obstacle in the way was, and hastened to remove it. A humble written explanation of the offensive passage in his speech was sent by him to the King, and kindly presented by the Duke of Wellington. In a somewhat ungracious reply the King expressed his satisfaction, and ordered a patent of precedence to be made out.

The death of George IV. brought summer, or at least spring, to the Whigs, who had so long been shivering in the cold of opposition. Denman had been for some time out of Parliament, but was at the general election of 1830 returned for Nottingham. It was at that election that Brougham secured by much efforts a seat for Yorkshire. Writing of him to his wife, Denman says, "Brougham is making a wonderful progress through Yorkshire, travelling a hundred miles and making speeches to 70,000 people a day." Brougham's days in the House of Commons were, as we know, almost over; he accepted the office of Chancellor in the same year, upon the

formation of the Grey Ministry. Nor was Denman's career as a member of Parliament to be a long one. But there was yet some useful work for him to do. The next two or three chapters of his life carry us through the stirring period of the Reform Bill. When Brougham was appointed Chancellor, Denman took office as Attorney-General. In that capacity he drafted the original Bill, and although it fell to other and greater Parliamentary orators to take the leading parts in the long discussions which followed, Denman, as chief legal adviser to the Ministry, had ever to be ready with a defence of its general principles, and especially its legal details. He was now at the height of his fame, enjoying the rewards which he had fairly earned by a consistent and sincere attachment to the Liberal party, through good report and evil report, and chiefly the latter. In consequence of the memorable dissolution of April 22, 1831, he had again to seek his constituency, on which occasion, so great was the enthusiasm, that he was drawn into Nottingham upon a triumphal car, with flags flying, and attended by a "countless multitude on foot." Of course he was re-elected, and had to resume the weary battle of fighting over, in a new Parliament, the details of the Bill, and defending it from the attacks of Tory lawyers, such as Croker, Wetherell, and Sugden. At the same time he had duties of a less pleasant nature to perform, having, as Attorney-General, to prosecute the foolish rioters who, in different places, had manifested their disapproval of the conduct of the Lords by insurrection.

Denman was again under a cloud for a short time, when the resignation of the Grey ministry threw him out of office. It was serious, as he had resigned his post of Common Sergeant, and could no longer, as an ex-Crown officer, practise on circuit. In one of his letters he mentions having gone with the Lord Advocate, "dear little Jeffrey," to receive the consolations of his mother, the venerable Mrs. Denman. But his anxiety was not of long duration. The Duke of Wellington could not form a Ministry, and Earl Grey was soon in power again, and on November 6, 1832, he resigned his office of Attorney-General to be sworn in as Chief-Justice of England. Lord Grey said that he had never made any appointment with greater satisfaction. It met, indeed, with general approval. The Master and Fellows of his college sent him their formal congratulations, and a deputation from the City of London presented him with an address. Denman, when appointed, devoted himself with great vigour to the destruction of what he termed "that gigantic monster called arrear." The first Circuit he travelled was the Midland, upon which nearly thirty years before he had started an unknown young barrister. Sir Joseph Arnold has published a number of interesting letters written at intervals upon these judicial journeys to his wife and daughters, and giving the Circuit news. Denman's letters, it may be here stated, exhibits his character as a private man in a very pleasing light,—that of an

affectionate husband and father, and a hearty and generous friend.

Another honour was yet in store for him. While on the Spring Circuit of 1834 he received a letter from Lord Grey intimating a proposal to raise him to the peerage. From Denman's answer, it is obvious that the proposal was a very welcome one to him in spite of a want of fortune and a large family. He was thus after a short interval again called upon to act as a legislator. As a member of the House of Lords we find him associated with several not unimportant legal reforms, of which he was either the originator or the strong supporter. Thus in 1838, in spite of the opposition of the other judges, more conservative than himself, he moved the "Oaths Validity Bill," by which all witnesses might be sworn according to the form binding upon their consciences, and those who objected to oaths might substitute affirmation. The bill, in so far as it accomplished the first of these objects, then passed, but an *oath* still remained imperative. In 1842 he again renewed his attempt to introduce affirmations, when after debate the matter was referred to a select committee. Nothing daunted, in 1849 he made another and last attempt to carry through his measure, which had been already successful in the Commons, but which the Upper House for the third time were enabled to defeat. He never lived to see the fruits of his labours, but in 1854, the year of his death, the Common Law Procedure Act gave effect to what he had so long contended for. He was more successful with another bill relating to the law of evidence, and by which was removed the exclusion of testimony on the ground of incompetency from interest, or from previous conviction. He supported the "Custody of Infants Bill," which gave to wives right of access to their children in cases of separation. There are several other Acts amending the law, for the success of which we are more or less indebted to Denman's unwearied efforts to sweep away abuses and anomalies from the jurisprudence of his country.

His name as a judge is connected with at least one great case, which as it is certainly the most important decision dealing with constitutional law in modern times, deserves some notice here, although to many of our readers it is doubtless well known. This was the case of *Stockdale v. Hansard*. It originated in an action for libel raised by the publisher Stockdale against the Messrs. Hansards, who in their capacity of Parliamentary printers, had published a report of Prison Inspectors, in which one of Stockdale's works was condemned as indecent. At the first trial before Lord Denman the defenders pleaded not only that the report in question was a privileged publication, but also that the expressions complained of in it were warranted by the facts, and upon this second issue a verdict was returned in their favour. Had the Hansards stood alone such a verdict would doubtless have satisfied them, and the public would have heard no more about the matter. But behind

the Hansards appeared the House of Commons, prepared to avenge this outrage upon their privileges which Stockdale had committed. The Hansards' counsel had asked for a direction on the ground of privilege, such as Denman refused to give. "I am not aware," said he, in his charge, "of the existence in this country of any body whatever which can privilege any servant of theirs to publish libels upon any individual." Accordingly, the verdict gave satisfaction to neither party, and when another action was shortly afterwards raised by Stockdale, the sole defence entered was that of privilege, counsel going the length of maintaining that the Acts of the House of Commons could not be questioned, and consequently that their publishers were protected from any such action. The case was argued before the judges of the Queen's Bench, and resulted in an unanimous decision against the defendant.<sup>1</sup> The judgment of the Chief-Justice—a most elaborate refutation of the House of Commons' claim—occupies alone fifty-four pages of the report. The result of this decision was to give rise to a conflict of jurisdictions, with very unpleasant consequences to certain individuals concerned. The damages which it carried to Stockdale, not having satisfied him, he raised a third action, in which he obtained judgment by default, and £600 (the House of Commons having prohibited any defence from being made), and the money was paid over to him by order of the Sheriffs of London. In the meantime the House of Commons had met, and, indignant at what had been done, committed Stockdale to Newgate, and ordered the Sheriffs to refund the money. As officers of the Queen's Bench they declined to obey, and followed Stockdale to prison. Now as the House had unquestionably power to commit for contempt, the unfortunate Sheriffs were unable to get redress from the Court of Queen's Bench, the judges there being obliged to respect the warrant upon which they had been committed, although they were well aware that the Sheriffs had only been obeying their own orders. Matters were becoming serious. The Commons would not release their victims, but proceeded to add to their number by arresting Stockdale's attorney, as well as his son, who had raised fresh actions against the Hansards. Public opinion backed that of the Judges, and an outcry was raised against what was felt to be the tyranny of the House. There was but one way of bringing the conflict to an end, and that was by putting Parliament to its proper use, and passing an Act to regulate its reports, and protect its printers in future. Accordingly this was done by the "Printed Papers Act, 1840," not much to the satisfaction of the extreme zealots in the House, who felt that it was a virtual defeat of their claim of privilege. Writing of this famous case, and the part which he took in it, Lord Denman calls it the most important event of his life, and that in which his future reputation must mainly depend.

<sup>1</sup> ix. Adolphus and Ellis, 1.

In 1840 he received a warning that that useful and most active career which for seventeen years he had now led must shortly close. In the spring of that year he suffered from a stroke of paralysis. In spite however of the remonstrances of friends and physicians, he insisted upon resuming his place on the Bench, where he sat through a whole term, engaging also in the debates of the House of Lords, and taking his chamber duty as judge in vacation. But it was a useless struggle with what was inevitable. When the Courts met in autumn, Denman was not present. For some time his brethren carried on their work without him. But it was soon seen that a perfect recovery was impossible, and his friends now urged him to resign. Most unwillingly did he at last consent, convinced by the opinion of the doctors consulted, and his resignation was given in on February 28, 1850. Few Judges upon their retirement into private life have met with more general homage and sympathy. Westminster Hall and the circuit (as represented by judges and barristers), grand juries and corporations, flocked round him with addresses. The unanimous press recorded his good qualities; although so keen and true a Liberal, old Tories admitted and admired "the unblemished purity from all tincture of party which was so great a characteristic of Lord Denman's Chief-Justiceship." As we have to do here only with Denman's public life, it may be sufficient to state that for some years longer he continued to live in comparative seclusion, although still manifesting his keen interest in all that was going on around. He died in his seventy-sixth year, in September 1854.

Denman may not take a place in the very first rank of eminent English lawyers. We think that he does not. Others were more eminent at the Bar and in Parliament. Even amongst his contemporaries upon the Bench there were doubtless several more learned and greater masters of the science of law. To other qualities did he owe in a great measure the reputation which he obtained—to his devotion to the cause of freedom, and his consistent conduct throughout a long career in office and out of office, exposed to the temptations which attend both situations. From time to time, as we have seen, was the nation called upon to hear his voice, raised always in the cause of liberty and progress, whether in defending an injured queen, contending against deep-rooted abuses, pleading the cause of the slaves, or refusing in spite of the Court to institute uncalled for and useless prosecutions. Those who knew him best have testified to his merits. "In the course of my experience," says his brother Judge Patteson, "I have never met with a more open-hearted and single-minded man. Everything that he said and did was sincere, frank, and guileless." But to Sir Joseph Arnold's pages must we refer such of our readers as desire to know more of Chief-Justice Denman.

W. G. S. M.

THE NEW FRENCH MINISTER OF JUSTICE,  
M. DUFAURE.

AMONG the many distinguished men who have rendered the bar of Paris celebrated throughout the whole world, few have been more prominent or more deservedly eminent than M. Dufaure. At the present moment his name is familiar to all readers as the recently appointed Minister of Justice in the Ministry formed by M. Buffet. Commenting on his appointment, and on the manly circular he has just issued as Minister, the *Journal des Debats* of 5th April last refers to him as "a man who, before becoming Minister of Justice, was so long the honour and glory of the bar." It will be interesting therefore to Scotch lawyers to have a short sketch of the career of this distinguished member of the French bar, and we are able to do so from having before us a work, entitled, "*Le Barreau de Paris, par Maurice Joly*," published in Paris in 1863, and which consists of a series of excellent "*Etudes politiques et littéraires*" that had appeared in several Parisian newspapers, and had been so well received as to induce the author to present them again to the public in the work just mentioned.

M. Dufaure commenced his life as a barrister by joining the bar of Bordeaux after completing his studies at Paris. He was then twenty-two years of age, and his remarkable success may be gathered from the fact that after the lapse of only ten years he was unanimously elected by his fellow-barristers to the post of "*batonnier*" or president of the provincial bar which he had joined. In France especially, political is sure to follow forensic distinction, and the electors of his *arrondissement* of Saintes had no hesitation in returning M. Dufaure to represent them in the Chamber of Deputies in 1834. M. Dufaure had anticipated his future sphere of usefulness and celebrity, and immediately upon his election as deputy gave up his practice at Bordeaux, and devoted himself exclusively to his parliamentary duties. Gradually he won for himself a high place as a practical, thoughtful, and powerful speaker. Gifted naturally with eloquence, he combined with its charms great sagacity and common sense. Undaunted by difficulties, he applied himself energetically to every question he took up, and by labour as much as by genius made himself master of all its details.

Especially in measures of a legal kind, although his attention was by no means confined to these, his activity and usefulness were as remarkable as they were valuable. Bills relating to the Courts, "*de première instance*," to patents, to secondary instruction, to the construction of canals, to bankruptcy, to appropriations of estates, "*pour cause d'utilité publique*," and to railways, received from him the most earnest attention, as well as some of their finishing touches and best provisions. To such an extent did some of

his fellow-countrymen feel themselves and their country indebted to him for "la grandeur de ses services," that they presented to him a medal struck in his honour, a proof of the distinguished part which, even at this early period in his career, M. Dufaure played as a deputy and legislator. This eminent position marked him out for office; and between 1834, when he entered the Chamber, and 1848, when the revolution occurred that drove Louis Philippe from the throne, M. Dufaure occupied various official posts. He was Councillor of State under the Thiers ministry of 22nd February, Minister of Public Works after the émeute of 12th May, and on two occasions Vice-President of the Chamber.

Not merely as a practical man of business, but also as an orator, M. Dufaure had distinguished himself even in the palmy days of French Parliamentary eloquence, when Manguin, Odilon-Barrot, Thiers, Guizot, and others swayed discussions in the Chamber of Deputies. M. Dufaure's manner of speaking is that attributed to Demosthenes—quiet, concise, and rapid, never losing sight of the question, but with deft reasoning and brilliant figures adding always more and more strength and persuasion to his argument. His mind is of that high order which penetrates things at a glance, whilst his power of speech enables him to set the question at issue clearly and precisely before his hearers. He is not only a great speaker, he is also a ready debater. With an imperturbable *aplomb* he attacks his opponents' position, and with vivacity and fire follows up the attack immediately. Like the late M. Guizot, he possesses that great gift, a power of ready reply; and let us add, to his honour, that with all his abilities and successes, he has ever taken care, whilst surrounding himself with friends, to give no cause to any to become his enemies. His personal amiability, his irreproachable character, above all his love of truth, have combined to render him at once one of the most popular and respected men in France.

Although indebted to M. Thiers for his first official position in the Chamber, he never allowed his individuality to disappear or his independence to be lost sight of. On more than one occasion he differed from his chief, and stated his opinion in the Chamber accordingly. Three men, nicknamed the *triumvirs*, ruled the French political arena at this time—Thiers, Guizot, and Odilon-Barrot. M. Dufaure, unlike most deputies, maintained an independent position in the Chamber, and a few of the "independent members" gathered around him, and regarded him as their chief; and, but for the revolution of 1848, it is quite possible that he might ere long have been called upon to form a Ministry of his own. Between 1848 and 1850, he was twice appointed Minister of the Interior, first by M. Cavaignac, and afterwards by Louis Napoleon after his election as President. This was the last favour which he received at the hands of the Bonapartes, for he had not held office long when he was dismissed with his colleagues, and during the Second Empire his name as a politician was almost unknown. He betook himself

to the Law Courts he had deserted for twenty years, but instead of returning to Bordeaux he devoted his great ability and knowledge to the grand forensic arena of Paris. There the success he had achieved as a legislator followed him as a pleader and jurist. He was intrusted with cases of the greatest intricacy, difficulty, and importance, and soon rose to the highest level among his brethren of the bar. Cases such as those of Pescatore, Michel, the Duc d'Aumale, M. de Montalembert, and the Marquis of Flers, rendered his name and abilities famous throughout the world. At the bar, as formerly, in the Chamber of Deputies, M. Dufaure distinguished himself by the ease and precision with which he handled and adduced the facts of the cases in which he was engaged, dealing ably with dates, figures, and the most intricate details, and drawing an unbroken thread of argument from an apparent chaos of materials.

At the same time he cannot be regarded as a perfect orator. His style is frequently dry, his voice is monotonous, and his accent is nasal. Unlike most Frenchmen, he is not in the habit of gesticulating violently when animated, but preserves an outward calm however much he may be inwardly agitated. His appearance, too, is by no means striking; on the contrary, it is that of a farmer or countryman, and his quiet, honest features and lazy gait in no ways proclaim the once energetic legislator, the greatest pleader at the bar, and now the Minister of Justice of France. Honest and simple alike of heart and in appearance, M. Dufaure has, unlike foreigners in general, accepted no cross and no order, "*Sabotonnaire étincelle par l'absence de toute décoration.*"

Such is a brief sketch of the distinguished man who is now at the head of one of the most important departments of the French Government. As to his politics, he was at one time believed to have Orleanist proclivities; he certainly never supported the Bonapartes. Now, however, in the circular which he issued as Minister of Justice on 30th March, he seems to have decidedly joined the Republican ranks. "The National Assembly," he says, "in the exercise of its constituent power, has established in France the Republican Government." It is fortunate for France to have so experienced a statesman, so eminent a jurist, and so honest a man as Minister of Justice at this important crisis in her eventful history.

R. R.

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## THE THIRTEENTH VOLUME OF THE AMERICAN . REPORTS.

THE thirteenth volume of the American Reports contains the cream of twenty-one volumes of Reports of the States of California, Tennessee, Indiana, Louisiana, New Hampshire, New Jersey, New York, Ohio, Pennsylvania and West Virginia, embracing 128



cases. These cases are mostly of great importance, many of them of decided novelty, and arising in so many different communities widely separated in interests and in geographical situation, and decided by so many different judges, they exhibit an amount of legal learning and a degree of judicial acumen which we dare say is not to be paralleled in any volume of any other series of reports in the world. Indeed, we regard this volume as the most interesting of the series. Nearly every principle of law commonly arising in practice, and many questions of novel and original nature, are here discussed and adjudged. All the branches of the law have light shed upon them. The head-notes and statements of facts are, in most instances, models of style and statement. Thus, in *Gagg v. Vetter*, the reporter gives the substance of 24 pages of statement and opinion in a syllabus of 9 lines; in *M'Duffee v. Portland, etc., Railroad Co.*, Judge Doe's opinion of 15 pages is boiled down into 7 lines, and another of 17 pages, by the same judge, in *Darling v. Westmoreland*, is fairly expressed in 4 lines.

It may be useful to glance over these pages in review, and cull out a few of the cases remarkable for their importance, their novelty, or their singularity.

In *Yancy v. Yancy* (5 Heisk. 353), page 5, it was held, that after the bar of the statute of limitations becomes complete, neither the legislature nor a constitutional convention can revive the remedy nor furnish a new one. The court, in this case, it seems to us, not only made a sound decision, but evinced a laudable candour, when they said that they were "willing, and even anxious, to correct any error into which we may be shown to have fallen." This was a singular case in one respect; the intestate had given to each of his daughters a female negro slave, and had charged these gifts to his children as advancements. About the same time, civilization made an advancement, and emancipated said slaves. Notwithstanding this, the chancellor held them to be good advancements. The question of the statute of limitations arose, in addition, out of these facts.

*Rixford v. Smith* (52 N. H. 355), page 42, is an important decision, respecting the liability of carriers of live stock. It is held, that where the owner had assumed the responsibility of placing the stock in the vehicles, the carrier is not liable for injuries occurring to the stock *in transitu* nor through his fault, but through their own fault or the mode of loading them. Doe, J., pronounces a learned opinion. The reporter furnishes an exhaustive note, disclosing the contrariety of decisions on this point. In most of the cases, special agreements had been entered into, modifying the common-law liability, but it may be gleaned from all the cases that the carrier is not liable for injuries resulting from the natural vices or propensities of the animals themselves. The case of slaves *in transitu* was one which formerly gave the courts a good deal of trouble.

*Darling v. Westmoreland* (52 N. H. 401), page 55, is another of Judge Doe's interesting and exhaustive opinions. The action was against a town to recover for injuries sustained by the plaintiff's horse in becoming frightened at a pile of lumber by the side of the road; the exclusion of evidence that other horses were frightened by the lumber was held error. It would seem, at first blush, that this question would depend more on the horses than on the lumber. A very curious case is cited by the court, *State v. Knapp*, an indictment for rape, in which evidence of specific instances was admitted to show that the defendant was a man of enormous strength; it was proved that he had carried a barrel of sugar ten rods, had put some Frenchmen out of his tavern, had ejected one witness from a town meeting at a meeting-house, had lifted so much upon scales, and, in a scuffle on the top of Moosehillock, on the 4th of July, had got the better of another party. Different doctrine seems to be held in Massachusetts, and even in New Hampshire; in *Hubbard v. Concord*, it was thought by one of the judges, that evidence that other people had slipped on the ice complained of was incompetent. The question seems to be fair matter of opinion; if a man's horse had been frightened by the same pile he might be called to testify to his opinion that it was frightful to horses, and, if so, why not speak of his actual experience?

In *Winchester v. Nutter* (52 N. H. 507), page 93, a meeting was held to make arrangements for a squirrel hunt; the plaintiff presided; it was agreed that the beaten party was to pay for the supper of the victors, and the captains of the respective parties engaged the plaintiff to furnish the supper; in an action against defendant to recover for the supper for the whole party, the plaintiff had judgment.

In *Wolfe v. Barnett* (24 La. Ann. 97), page 111, the defendant was enjoined from selling an imitation of the plaintiff's gin, under the name of "Aromatic Schiedam Schnapps," or "Wolfe's Aromatic Schiedam Schnapps." In *Burke v. Cassin* (45 Cal. 467), page 204, the defendant was enjoined from using the name of Wolfe or Von Wolfe in the same sort of manufacture; but it was held that neither of the words "Aromatic Schiedam Schnapps" was entitled to protection as a trade-mark, on the ground that these words do not furnish any reason for a monopoly of their use. The reporter might also have referred in his note to *Wolfe v. Burke*, 56 N. Y. 115, where the same decision was reached, on the ground that the words were a fraud on the public, because they palmed off an alcoholic beverage, in common use, exclusively as a medicine and specific for certain diseases. These three cases are a singular exhibition of what diverse judgments different courts will reach on the same facts, and what different reasons they will adduce for the same conclusions.

In *Hubbard v. Moore* (24 La. Ann. 591), page 128, it was held,

that the plaintiff could recover for furniture sold, although he knew the defendant intended it for a house of prostitution. The court remark: "Although it is not shown that when he delivered the furniture he told the defendant to go her way and sin no more, it is not thence to be inferred that he encouraged her in continuing in her immoral course of life." "To the vicious and depraved, as well as to the good and virtuous, belongs the right to acquire the needs and comforts of a common humanity. A different doctrine would adopt the visionary notion that there are to be 'no more cakes and ale.'"

To *Avegno v. Hart*, page 133, is appended a valuable note on the "Law of the Road," in respect to travellers in vehicles.

To *Callahan v. Donnolly*, respecting restraint of trade, and *People v. Woodward*, respecting the abetting of felony, the reporter has appended elaborate and learned notes.

In *Redington v. Woods* (45 Cal. 406), page 190, it was held, that where a bank had paid a raised check, had timely notified the defendant of the forgery, but had failed to return, or offered to return, the check, they could not maintain an action to recover the amount.

In regard to the California decisions reported in this volume, we feel authorized in saying that they are remarkable for the variety, interest, and importance of the questions, and for the learning and ability with which they are discussed and adjudged. California is evidently taking a front rank in respect to the weight of its legal decisions.

In Ohio, we find the vastly important case of *Board of Education of Cincinnati v. Minor* (23 Ohio St. 211), page 233, deciding that the courts have nothing to say as to the "Bible in the public schools." We presume most of the Protestant clergy will tear their hair when they read that "we are not called upon as a court, nor are we authorized to say whether the Christian religion is the best and only true religion." This court also say: "Three men—say a Christian, an infidel, and a Jew—ought to be able to carry on government for their common benefit, and yet leave the religious doctrines of each unaffected thereby, otherwise than by fairly and impartially protecting each, and aiding each in his searches after truth. If they are sensible and fair men, they will so carry on their government, and carry it on successfully and for the benefit of all. If they are not sensible and fair men, they will be apt to quarrel about religion, and in the end have a bad government and bad religion, if they do not destroy both."

In *Ridgway v. Mastin* (30 Ohio St. 294), page 251, it is held, in agreement with *Malloney v. Horan*, 49 N. Y. 111, that where a wife joins with her husband in a conveyance of lands, which is subsequently set aside by the husband's creditors as fraudulent, the wife's right to dower is revived.

*Franklin Insurance Co. v. Hazard* (41 Ind. 116), page 313, decides, contrary to the law of New York, but in conformity with

that of Massachusetts, that the assignee of an insurance policy, procured by the assignor on his own life, cannot maintain an action thereupon. We stand by New York in this. If the person procuring the insurance has an insurable interest in the subject, he may do what he has a mind with the policy.

*Gagg v. Vetter* (41 Ind. 228), page 322, decides, that the proprietor of a manufactory in a populous part of a large city is bound to a high degree of care and skill in the construction and use of its furnaces and chimneys, and liable for any injury to the property of others caused by a failure to use such care and skill; an interesting review of the cases respecting the communication of fire.

*State ex rel. Sanford v. Court of Common Pleas of County of Morris* (36 N. J. 72), page 442, holds the "local option" law constitutional. Iowa and California have declared similar enactments unconstitutional, but "Jersey" seems to leave it to her people locally to say whether they will or will not tolerate "lightning." The same is held in *Locke's Appeal*, 72 Penn. St. 491, reported in this volume.

In *Slocum v. Seymour* (36 N. J. 138), page 432, it was held, that a sale by the owner of the freehold of timber standing thereon is a sale of an interest in lands. The court say there is great diversity in the cases, and that the English cases are "conflicting," but they regard this as the result of the best-considered decisions. They also intimate that there may be such a thing as a legal severance "by the force of a written instrument," sufficient to change the character of the property. This idea we have taken pains to controvert. We cannot conceive that real estate can be converted into personalty by a deed conveying it.

A very important case is *Wolcott v. Mount* (36 N. J. 262), page 438. M., a market gardener, applied to W., a dealer in agricultural seeds, for "early strap-leaved red-top turnip seed." W. showed him seed which he said was of that kind, and sold it to him as such. M. informed W., at the time of the purchase, that he wanted that kind of seed to raise a crop for the early market. M. sowed the seed, and it turned out to be of a different and inferior kind. W.'s representation was in good faith, as he had bought the seed for what he sold it. It was held, that whether W.'s statement was a warranty or a mere expression of opinion was a question of fact for the jury, and that the measure of damages was the difference between the crop raised and that which would have been raised had the seed been genuine. We suppose this holding is supported by the decisions cited by the reporter in this note; but the question still remains, whether if the seed sold had really been raised from "early strap-leaved red-top turnip," but had failed to produce the like, the vendor would have been liable; in other words, whether in the absence of an express warranty the vendor of seeds will be held impliedly to warrant anything more than the genuineness of the origin of the seed.

In *Kirland v. State* (43 Ind. 146), page 386, it was held, that the beating of a horse, which the prosecutor was driving, was not assault and battery. There are some rather fine distinctions on this point. Thus, cutting a rope which bound a negro, beating a house in which one is, striking a cane which one holds in his hand, or the horse on which he is riding, is assault and battery; but it seems that the assault cannot be communicated through the reins with which one is driving. The distinction between this and the house in which one is sitting is certainly delicate. The decision in question, however, must be right; for, if it is not, a telegraph operator at Albany might be convicted of an assault on another operator at Buffalo by electrical violence.

Among the Pennsylvania cases we find *Follansbee v. Walker* (72 Penn. St. 228), page 671, which holds that an attorney, who has opened a cause and examined witnesses, is still a competent witness for his client, and will doubtless be a comfort to General Tracy in the pending case of *Tilton v. Beecher*. We really hope the General will not be deterred by the remark of Justice Rogers in another case, that "it is a highly indecent practice for an attorney to cross-examine witnesses, address the jury, and give evidence himself to contradict the witnesses," which is as much as to say that it is "highly indecent" for a man to try his own case. *Gass' Appeal* (73 Penn. St. 39), page 726, holds that a Sunday-school is not "divine service." In *Pennsylvania Railroad Co. v. Beale* (73 Penn. St. 504), page 753, it is held, that the failure of a traveller on the highway to stop immediately before crossing a railroad track is such negligence as will prevent a recovery.—*Abridged from the Albany Law Journal*.

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### CROSSING THE RUBICON.

DESPITE of a little fear lurking,

I have pulled through my final Exam.;

So adieu for a short time to working,

And farewell for ever to cram.

I shall put on my gown—not unheeded;

Some, seniors, shall wish me good luck,

Will tell me of men who've succeeded—

Not a word about those who have stuck.

In this breathing space, just for a moment

I brood, and I muse, and inquire,

What my fortune is—well or ill omened?

What my portion is—lower or higher?

Come, tell me, thou ancient *haruspex*,

Are we classed with the fortunate few?

Shall sunshine or shade rest on us specks

Of cloud in the infinite blue?

Shall the barque of my fortunes, a "clean ship"  
 Return to the port whence it came?  
 May I ever aspire to the Deanship,  
 And to leaving a notable name?  
 Shall I come to be Lord Justice-General,  
 Or only be Lord Justice-Clerk?  
 Comes a sinister whisper, "New men are all  
 Inclined to shoot over the mark."

Shall I rank with the forcible-feebls,  
 Or shall I come out as a star?  
 Shall I try salmon fishers in Peebles,  
 Preferring that much to the bar?  
 Shall I, waft on a wild wind, be borne away  
 To regions forlorn and remote?  
 To Lerwick, Lochmaddy, or Stornoway,  
 Where life is not worth half a groat?

After years shall I willingly take a  
 Decent banishment out in Ceylon,  
 Judge coolies and blacks in Jamaica,  
 Or elsewhere in some tropical zone?  
 On the Gold Coast, o'er niggers and Kroomen,  
 Shall it be my sad fortune to reign?  
*Nota bene*, some good men and true men  
 Such little jobs did not disdain.

Or tied to the helm of some journal,  
 Shall I drudge through the sultry July,  
 And feel it not easy to spurn all  
 Temptations to have a "good shy"?  
 Let the high Fates our fortunes determine—  
 Yet what matters their smile or their frown?  
 Some hearts have been sad 'neath the ermine  
 That were merry beneath the stuff gown.

I own, like the rest of mankind, most  
 Legal folks rather favour the first;  
 So with watchword of "Deuce take the hindmost!"  
 Let us go at our work with a burst.  
 Nay! nay! with an honest endeavour,  
 With a spirit that's gallant and true,  
 Let us strive and be thankful,—whatever  
 The Fates bring to me and to you.

## RECENT ENGLISH REAL PROPERTY STATUTES.

THE legislation of Session 1874, affecting real property in England, has been collected and published with a commentary by Mr. Charley, M.P.; and as the volume contains many matters of interest to Scotch lawyers, we propose to give an analysis of its contents.

1. Lord Selborne's Act "to alter and amend the law as to appointments under powers not exclusive" (37 & 38 Vict., c. 37), has settled the long vexed question whether a person having a power of appointment over a fund, whether real or personal, to be exercised in favour of a certain number of persons, was bound to appoint a substantial share to each. Originally, in such a case, if the testator, or donor of the fund, had not said distinctly that none of the contemplated objects of the power were to be excluded, or that each was to get a specified *minimum* share, the rule at common law was, that an appointment of a nominal or illusory share (whereby the appointee was really disappointed) held good; but the Equity Courts declared that each share must be substantial. In 1830 Lord St. Leonards carried through a measure which provided that, unless it clearly appeared on the face of the instrument conferring the power that the donor intended each to get a substantial share, illusory appointments should be valid both in equity and in law. The real purpose of this statute was to induce testators to specify the shares, and so avoid disputes; but, as it did not affirm a power in the donee to pass over any of the objects, unless he made his discretion ridiculous by giving the practically excluded object a shilling or so, this purpose was not achieved, and appointments continued to be disputed. The recent statute puts the matter on a common-sense basis by enacting that no appointment made after the date of the Act shall be invalid on the ground that any object has been altogether excluded, but that such appointment shall be valid, notwithstanding that one or more objects shall not thereby, or in default of appointment, take a share. The only counter-proposition among lawyers was, that a statute should declare the proportion of the whole fund, which should be taken as the *minimum* possible in any appointment, an attempt to apply the notion of indefeasible succession to a state of facts which entirely excludes the propriety or justice of such an arrangement. The Lord Chancellor tersely summed up the new law by saying, "It is not now necessary to cut off a man with a shilling."

2. The "Act for the further Limitation of Actions and Suits relating to real Property" (37 & 38 Vict., c. 57) is a very courageous experiment in the simplification of title. The periods of limitation recognised by English law were at first very long and very fluctuating; they were calculated from some great historical event, such as the first voyage of King Henry III. into Gascony. In Henry VIII.'s reign a period of sixty years was fixed, which was reduced

in the time of James I. to twenty years. The well-known limitations of William IV. added to the bar of remedy a provision that the title of the person against whom twenty years of limitation had run should be extinguished. The new Act, which was passed in the expectation that the Lands' Transfer Bill, requiring compulsory public registration of all sales of land made after a certain date, would also pass, further reduces the prescriptive period to twelve years. It has adopted this figure from recent Indian legislation. The *puncta temporis* from which the period is to run are as follow: (a) where the claimant has been in possession, discontinuance of possession, or ceasing to receive rent; (b) the death of a deceased person, who had possession, and through whom the claimant claims; (c) where the claim is under an instrument, at the cesser of the last rightful possession under that instrument; (d) in the case of a reversion, remainder, or other future estate, when it becomes an estate in possession; but a person entitled to a present possession which has been barred by limitation, will not receive any new right with respect to a future estate, which comes into possession on the determination of his earlier right; (e) the forfeiture, or breach of condition, on which a previous estate is determined, the period of twelve years is to run from the date of *his* right. If however, the last person entitled shall not have been in possession, or in receipt of profits, when his interest determined, accruing only if that be a longer period than a period of six years from the claimant becoming entitled by the determination of his predecessor's interest. The object of this is to prevent successive rights of action for twenty years accruing, *e.g.* to a series of life-tenants; the period of *dispossession* is to be reckoned, and if that amount to six years, then the next life-tenant or remainder-man will have only six years more. In cases of infancy, coverture, and unsoundness of mind, six years will be allowed from the termination of the disability; if the disability terminates by death, the representative has the benefit of this provision. Absence beyond seas (which Lord Campbell had abolished in 1856 as a protection from the six years' limitation of personal actions) is to have no effect whatever; and even in the case of the disabilities above mentioned a period of thirty years (including the privilege of six years) is to be the utmost allowance. The effluxion of the period of twelve years is further declared to have the extraordinary effect of giving a full operation to a disentailing deed or assurance, which otherwise would not have excluded the remainder-men. An acknowledgment by a mortgagee of the title of a mortgager, or of his equity of redemption, will of course give rise to a fresh term of twelve years, during which, if the mortgagee be in possession, his right will become absolute. In the same way, if no interest be paid or acknowledgment given, the right to recover money charged on land and legacies will be extinguished at the end of twelve years. The chief exceptions from the foregoing rules are: (1) where an *express* trust has been constituted, the



beneficiary's claim against the trustee never expires, though against a *bona fide* purchaser for value his claim will begin to prescribe at the date of the conveyance by the trustee; and (2) where the claimant has been kept from possession by a concealed fraud, the period of limitation runs from the time at which such fraud might, with reasonable diligence, have been discovered. In order to give persons with claims, which would be barred by the new Act, an opportunity of prosecuting them, it is not to come into operation till 1st January 1879.

3. Of equal importance to the last mentioned statute is "The Act to amend the Law of Vendor and Purchaser, and further to simplify Title to Land" (37 & 38 Vict., c. 78.) Until this year the abstract of title furnished by a vendor has always extended back over a period of sixty years. In some cases, if estates tail were supposed to be existing, or if a reference in the prescriptive title suggested a doubt whether the fee was in the vendor, inspection, though not an abstract, of even older muniments might be demanded by a purchaser. The rule was, of course, to some extent suggested by the duration of human life taken in connection with the Statute of Limitations. In practice, however, as the Lands' Transfer Commissioners say (Rep. p. 20), "the average of titles do not extend farther back than thirty years at most, but the length of abstracts had become a serious evil. The new statutory rule is that on conveyances of land in the future the period for the commencement of title, to which the purchaser shall be entitled, is to be forty years, except in cases where formerly documents older than sixty years might be called for. The Act then makes part of the public law certain regulations, which have till now almost universally appeared in conditions of sale by auction and private agreement for sale. These are: (a) in contracts to grant or assign a leasehold interest, the intended lessee or assignee cannot call for the title to the freehold. (b) Recitals, statements and descriptions of *facts, matters, and parties* (not conclusions of *law*), contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall (unless proved inaccurate) be taken as sufficient evidence of their own truth. Great hardship had been felt from the rule that such statements were evidence only against the parties to the deeds containing them. (c) If a purchaser will have an equitable right to the production of titles, he is not to insist on a covenant to produce by the vendor. The following are cases under this rule:—The owner of an undivided share desiring the common title; estates held under separate titles created by a single instrument, as under a settlement, an exchange, or a partitions; the remainder-man desiring the title from a tenant for life, who has a limited ownership in the titles as well as in the estate. (d) Such covenants for production, as the purchaser may require, are to be furnished at his expense, and the vendor shall only bear the expense of perusal and

execution on behalf of and by himself, and other necessary parties not being the purchaser. (e) When the vendor retains part of an estate he will keep the documents of title applicable to it. The Act then declares that these rules of sale may be followed in sales by trustees, who were formerly thought to have no right to put any restrictions on a purchaser's *prima facie* right to a marketable title, as this might have the effect of reducing the price paid. It is very beneficially provided that the legal personal representative of a mortgagee may convey the legal fee of the mortgage estate on payment of debt, etc., due. This was often delayed until the heir-at-law of the mortgagee (in whom the common law vested the security-lands, unless they were devised) came of age. Now no new rule of succession is hereby introduced, for the executor was always entitled in equity to the heritable debt; it is only a conveyancing difficulty which has been removed. A similar section, with a similar object, provides that when a bare trustee (i.e. a trustee who has no further duties to perform) dies intestate vested in a fee simple freehold, this will pass, not to his heir-at-law, but to his legal personal representative. In Scotland, the trust lapses altogether,—a result which leads frequently to avoidable expense, where a conveyance to a beneficiary is all that is required. This useful provision includes the case of a married woman coming to be a bare trustee, she may then convey without ratification, and without concurrence of her husband. The curious doctrine of tacking—the *tabula in naufragio* of creditors, as it has been described—is finally abolished by this Act. Tacking occurred where, for instance, a third mortgagee (who had no notice of a second mortgage) acquired the first mortgagee and was thus enabled to satisfy both his debts before the second mortgagee got a shilling. It was an instance where law and equity had undoubtedly succeeded in making a mess of it between them. By the last section a valuable summary jurisdiction is conferred on the Chancery Judges at chambers; they are to dispose on simple motion of any questions as to requisitions, objections, etc., or claim for compensation, rising out of a contract of sale which the parties without filing bill or petition may bring before them. This extends to private sales, the practice in sales of property in the hands of the Court.

4. We conclude by referring to the "Act to extend the powers of the Leases and Sales of Settled Estates Act" (37 and 38 Vict., c. 33). This will apply chiefly to proceedings like those taken in the Court of Session under the 4th section of the Rutherford Act. The original Act of 1856 authorized sales, leases, etc., of lands in strict settlement with the consent of the first tenant of entail in existence, and of all persons in existence having any beneficial estate under the settlement prior to the estate of the tenant in-tail, and also of all trustees having any estate on behalf of any child unborn taking before the tenant in-tail. The clearest case of benefit to all parties, however, was held not to dispense with the necessity of a consent,

which was often mischievously withheld, and still more frequently because the parties could not be got hold of. By the recent Act notice is to be given to those who should consent, requiring them to notify their decision within a short time; and whatever the result, the Court, having regard to the number and value of the interests which have consented, but entirely in its own discretion, may appoint a sale or lease, etc. This dry reform of procedure is expected to have an extensive influence on the commerce in land.

Scotch conveyancers sometimes grumble at the rapid changes which have occurred in Scotch property law since the Acts of 1845. They too frequently regard the land tenure of our southern neighbours with a superstitious horror which it does not deserve. If they would only look into Shelford's Statutes of William and Victoria, relating to land and real estate, and reflect that a compulsory registration bill may be expected to pass before long, they would see that in England much more numerous and violent changes have occurred in a much more complicated and artificial system.

W. C. S.

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#### CONDITIONS IN RESTRAINT OF MARRIAGE.

By the Roman law *conditions in restraint of marriage* were discountenanced, and in general held illegal. They were hence accounted *pro non scripto*. This was a consequence of the Lex Julia et Papia Poppæa, intended to favour marriage and to punish celibacy, so as to fill up the gaps in the state which the long civil wars had made. But even in Rome the condition appears to have been good, if it only prohibited marriage with a particular individual (D. 35, 1, 63 pr.) Our Courts will view these conditions much more favourably than the Roman law did, both because there is no such necessity as that which prompted the Lex Papia Poppæa, and because many restraints on marriage are very just, reasonable, and beneficial. The Malthusians, too, will add that they are greatly conducive to the welfare of the state.

A condition *totally* prohibiting marriage would, it is pretty certain, be held *pro non scripto* (vide Mr. More's Notes on Stair, vol. i. p. 22). To this we must except the case of a widow being prohibited to marry again. In *Fowlis v. Gilmour* (Feb. 22, 1672, M. 2695), where one made his wife universal legatee, failing her daughter, on condition that she should remain unmarried, the Lords observed that the condition *si vidua manserit et non nupsarit* was consonant to law and not reprobate. And indeed it is very common to see such a condition in a settlement. A similar condition in a postnuptial contract, applicable to the second marriage of the surviving spouse, was held valid in *Kidd v. Kidd* (10th Dec. 1863, 2 Macph. 227). Thus far our law is clear. But when we come to con-

sider conditions laying not *prohibitions* but *restraints* on marriage, *e.g.*, imposing the necessity of consent of certain persons, we are led into what at first appears a waste howling wilderness of decisions, destitute of reason or even of concordance with one another. Stair states that such conditions are null if adjected to the legacy by a parent, but are valid if imposed by a stranger under no obligation to provide for the object of his bounty (Inst. i. 3, 7; see Bankton i. 5, 9). This distinction no doubt held when Stair wrote, but it was not recognised at an earlier stage of our law, nor is it recognised now. Nor indeed is there any reason why it should. So far as a parent's liberality extends beyond what is due, *ex lege*, he is in the position of a stranger. And it is only to this extent that the question comes before us; for if the father granted only what was equal in amount to the legal provisions, he could not impose this or *any other condition*. The children could claim the amount *absolutely*.

There appear to us to have been four successive stages of opinion as to the effect of conditions in restraint of marriage attached to gratuitous rights.

1. In the early law, when the Roman system was received with implicit faith, without considering the different state of society which it had been devised to regulate, conditions in restraint of marriage were held *pro non scripto* in all cases,—whether contained in a grant by a stranger or by a parent. Thus in *Cullernie v. Laird of St. Monance* (December 12, 1578, M. 2963), a provision by St. Monance to Cullernie's sisters with the condition that they should marry with a certain consent was held due, though they had married without such consent. A similar decision was given in *Kennoway v. Campbell* (July 16, 1617, M. 2964).

2. Soon after the last-mentioned case, gifts by third parties were placed on a different footing from those by parents, so that to the former full effect was given. In *Hume v. Her Tenants* (Dec. 16, 1629, M. 2964), this was held in reference to a *tack*, and, *a fortiori*, it would have held in reference to a purely gratuitous grant like a legacy. Accordingly, in the next case we meet with directly bearing upon the point, a condition in a bond of provision granted by an uncle to a niece, that she should marry with a certain consent, required to be purified: *Rae v. Glass* (Jan. 17, 1673, M. 2967).

3. Soon after this, legacies and provisions by a parent were assimilated to those by a stranger; so that effect was given in all cases to the condition. Thus in *Buchanan v. Buchanan* (Feb. 13, 1680, M. 2968), a provision by a father to his daughter, under condition that she should marry with his consent, was held not exigible, she having married without asking consent, and this although the marriage was quite suitable. In *Hamilton v. Hamilton* (Feb. 13, 1681, M. 671), the same general principle was affirmed, although the Court held it did not apply in that case, inasmuch as the daughter had not been informed of the condition.

4. The rigour of these rules was soon relaxed, so that effect was not given to the condition where it was not reasonable. So, where no good ground could be alleged for withholding consent, the beneficiary's interest was not held forfeited though he married: *Foord v. Foord* (March 1682, M. 2971); *Gordon v. Petrie* (March 30, 1682, 3 B. S. 433). The condition has been held purified although the consent was not given precisely in the manner prescribed by the testator or other granter of the gift. Thus in *M'Kenzie v. Creditors of Kininmonty* (June 6, 1650, M. 2977), consent, though ordered to be *in writing*, was held to be sufficiently given by acts necessarily implying it. And in *Grahame v. Bain* (February 9, 1774, M. 2977), although the testator required the consent to be given by a majority of his Trustees, and to be regularly entered in the sederunt book, it was held sufficient that two of the Trustees verbally consented, and that the other two, who had not even been asked to consent at the time of the marriage, afterwards admitted that they had nothing to say against it.

The same wise construction has been given to conditions imposed by a parent, to wit, that effect will be given to them so far as reasonable, and no farther; so that they are again assimilated to conditions imposed by a stranger. Lord Kilkerran, in reporting the case of *M'Kenzie, supra*, says, "Where a father who is under a natural obligation to provide for his children qualifies a bond of provision to his daughter, with a condition of her marrying with consent of persons therein named, the tocher will be due without their consent, without doubt, *if the marriage be suitable*." This was held in *Buntin's Trustees v. Buchanan* (July 7, 1710, M. 2972). The Lords observed, that "if she had married a *turpis persona*, or with great disparity," they would have taken it to consideration. The same appears to have been the ground of decision in the prior case of *Dalziel v. Scotstarvet* (June 9, 1687, M. 2971); but the case is very meagrely reported. Much more will this hold if the consent is refused by a party who has an interest to do so: *Pringle v. Pringle* (July 20, 1692, M. 2972). It has been held sufficient in regard to such a condition imposed by a father, as it had been previously in regard to one imposed by a stranger, that the consent be given at any time, even after marriage: *Welwood's Trustees v. Boswell* (June 21, 1851, 13 D. B. M. 1211). Lord Fullerton observed, that "it would be carrying the principle a tremendous length to say, that if this young woman did not obtain the consent of the trustees before marriage she is to forfeit the estate, although the marriage is perfectly unexceptionable, and the trustees are willing to give their consent to it." The death of the party whose consent is required will, by rendering the fulfilment of the condition impossible, enable the legatee to take the bequest unconditionally: *Grant v. Dyer* (8th December 1813, 2 Dow 73). If, however, the consent be refused on sufficient grounds, the condition will not be held purified: *Hay v. Wood* (Nov. 27, 1781, M. 2982). Nor will a

condition *prohibiting* marriage with a particular person be held unreasonable, whether adjected by the father or a stranger: *Douglas v. Douglas Trustees* (Feb. 7, 1792, M. 2985), reversed by House of Lords, 15th March 1796, under the title of *Ommaney v. Bingham* (Paton's Appeal Cases, iii. 448). This case was decided according to the English Law, which was held to regulate it, but Lord Chancellor Loughborough stated that, even according to Scottish Law, there was nothing to prevent a parent from imposing such a reasonable restraint.

A question remains: Would a condition that the legatee should marry a particular person be such a reasonable restraint as the law would recognise? In the Roman law it certainly was. Erskine takes for granted that it would be (Instit. 3, 3, 85). On the other hand, Craig says, "*Legata quæ eo nomine fuint ut aliquis vel aliqua alii nubat, non præstanda censentur, ne quis prece aut pretio ad conjugium cogantur*" (*De Feudis*, II. xxi. 2). We have met with no case in our law deciding the point. In *Mackrath v. Alexander* (Jan. 2, 1712, M. 2975) the Court avoided a decision. Here an estate had been disposed to a boy A, and B, a grand-daughter of the disposer, and the heirs of their bodies, adding that A. and B. were to intermarry. On the old gentleman's death, the heir of line entered into possession, whereupon aliment from the estate was demanded for A. This he was held entitled to, *whatever might be done in future if he refused to marry on requisition.*

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### The Month.

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*Verdicts and Vagaries of Juries.*—A case was recently tried before the Lord Justice-Clerk and a jury, which, for reasons that must be obvious to everybody, has assumed in the "ordinary channels of information" an importance beyond the intrinsic importance of the case. The action to which we refer is that of *Johnstone v. Dilke*,—an action raised by a firm which had published a map of Africa alleged to be a little behind the age, against a newspaper proprietor who had published a map of the constitution of England said to be a little in advance of the time. If an action goes against an ordinary person he grins and bears it. But if an action goes against the proprietor of a periodical, he says that the liberty of the press is in danger, and naturally enough other periodicals chime in with the complaint.

In this case the damages were heavy. The damages were estimated at £1275; and to those unacquainted with the proceedings of juries it must have been a puzzle to divine how this precise sum of £1275 was arrived at. An Edinburgh newspaper states, "on the most trustworthy authority," that is to say, from information

received from one of the jurymen—that this amount of damages was arrived at by the twelve jurymen taking the average of the sums handed in on slips of paper by each jurymen. It may be right or it may be wrong for juries to arrive at a result in this way. But it is certainly very wrong of any jurymen to reveal the secrets of the jury-room. If this sort of thing is to go on, it would be much better to have newspaper reporters admitted to the jury-room. We should then have no difficulty in ascertaining whether the report was correct. Most indubitably, it would be better to have an authentic report than to have a surreptitious report.

In Scotland, trial by jury in civil cases has never worked very well, and even the proverbial reticence of Scotsmen seems to have deserted Scottish juries. In the action against Miss Jex Blake, a female medical student, six of the jury were for the pursuer and six were for the defender. To settle the matter they determined to give nominal damages,—such damages as would not be followed with expenses. The jury sent for the Clerk of Court, who, on the question being put to him, informed them that a verdict awarding £5 of damages would not carry expenses. The question was one which the jury had no right to put, which the Clerk had no right to answer; and, as it turned out, the answer was wrong. The Court held that, in the circumstances of that case, the verdict did carry expenses. A newspaper correspondence of some duration followed. One jurymen wrote to the newspapers giving his opinion as to what occurred, and another jurymen wrote contradicting that statement.

All this is most unseemly. Lord Chancellor Erskine remarked that at the great Day of account, when all secrets shall be revealed, we shall know why boots are always made too tight. At the same period, we may remark, it will be known on what principle the verdict of juries is returned. It humbly appears to us that the deliberations of juries should be kept secret until that time; when it is almost certain there can be little difficulty about getting a rule for a new trial.

On this subject the *Solicitors' Journal* remarks:—

“We have not met with any authority expressly in point as to the effect upon a verdict of recourse being had to the expedient of taking an average under such circumstances as those disclosed with reference to the Edinburgh case. There are, of course, cases of compromises by a jury leading to verdicts clearly inadequate, such as the very recent case of *Falvey v. Stanford* (23 W. R. 162), and the earlier reports are full of cases of the adoption by jurors of modes of decision which saved them the trouble of arriving at an agreement by full and fair discussion. In one of the earliest of these, in the reign of Charles II. (*Prior v. Poyers*, 1 Keb. 811), a Bedfordshire jury, being equally divided in opinion, agreed to put two sixpences into a hat and give their verdict for plaintiff or defendant, according as one or other sixpence was taken out by the person selected to draw. Upon an application to set aside the verdict, Windham, J., was of opinion that ‘this is as good a way of decision as by the strongest body; which is the usual way.’ Twisden, J., however,

'doubted it would be of ill example,' but, as the circumstances under which the verdict was given 'appeared only by pumping a juryman who confessed all,' the court refused the application for a new trial. In subsequent cases the opinion of Twisden, J., was adopted, and verdicts arrived at by similarly irregular means were set aside, even though the verdicts chanced to be right. Thus in *Hale v. Cove* (1 Str. 642), where a jury, after sitting up all night, agreed to put two papers in a hat marked P. and D., and to decide for plaintiff and defendant according as the P. or D. paper was drawn, it happened that the verdict thus given was in accordance with the evidence and the opinion of the judge, but nevertheless, on a motion for a new trial, it was set aside. In *Parr v. Seames* (Barnes, 438), where the jurors agreed to determine their verdict by the circumstance of whether the major part of halfpence 'hustled in a hat' came up heads or the reverse, the court seems to have admitted the affidavit of a juryman to show what happened in the jury-room. But it has long been settled, in accordance with the early case above cited, that the testimony of the jury themselves cannot be received (see *Vaise v. Delaval*, 1 T. R. 11; *Straker v. Graham*, 7 Dow, P. C. 223), so that provided a jury take the precaution to ascertain that the walls of their room are thick, and that there are no listeners outside the door, they may be tolerably safe that their verdict, arrived at by chance, will not be upset. According to Lord Mansfield, however (1 T. R. 11), jurors who adopt these means of coming to a decision commit 'a very high misdemeanour,' and in the reign of Charles II. jurors who had cast lots for a verdict were fined (*Foster v. Huoden*, 2 Lev. 139). In the same reign, a Northumberland jury, who had agreed to determine the matter at issue by the fall of a sixpence, were ordered to attend the court the next term (*Fry v. Hardy*, T. Jones, 83). An Irish jury, mentioned by Mr. Baron Deasy in his evidence before the committee on the jury system in Ireland last session, took the precaution of attempting to obtain judicial sanction for an irregular mode of obtaining a verdict. 'The jury came out, and the foreman said, 'My Lord, we wish you to decide this case yourself.' I said, 'I cannot give a decision for you.' They again returned, and in about an hour they came out, and one of them said, 'My lord will you let us have a vote for it?' . . . I had to discharge them."

In a very recent case, we understand that the Court of Common Pleas held that, although such a mode of arriving at a result as that which the Edinburgh jury adopted was improper, the fact that it was employed is not of itself a ground for granting a new trial.

*The Northern Lights Commissioners and their Secretary.*—A little attempt has been made to raise a little tempest, because the Commissioners of the Northern Lights have appointed a member of the Bar to be their Secretary, at a salary of £600 a year. There was a whistle for the wind; but, like the spirits of the vasty deep, it did not come when they did call for it. This appointment, it is said, is a job. If it were so, it would be a sufficient defence to plead, like the nigger lady, that it is such a little one. Dr. Cameron, one of the members for Glasgow, put a question in the House of Commons on the subject. There was also, we believe, an article in that gentleman's newspaper, the *North British Daily Mail*, assailing the



appointment as a job. That newspaper has a trick of discovering jobs, and it will be remembered that a diatribe, or rather a succession of diatribes, against the Lord Provost of Glasgow and other eminent persons in that city, for committing a job, which turned out to be no job at all, but a disinterested act for the public welfare, proved to be anything but a lucrative investment for that journal. It whistled for a wind and it paid for its whistle. Also, in a large constituency, where there are a great many uneducated people, nothing tells better than the discovery of a job. The trade of representing the meaner portion of mankind is not one which many persons would care to take up. But if you take up a trade you must follow the custom thereof; and consequently it was incumbent to make an attempt at discovering a job. Then comes the *Daily Review*, which attacks the Commissioners for the appointment they have recently made. The new Secretary is, we are told, the author of a good but pre-eminently dry treatise on Parochial Law. Now, how can the writers on legal subjects in the *Daily Review* know whether the book is dry or not. We presume that they read their own articles; and after that a man's intellectual energies must be too much exhausted to allow of his reading anything else. Besides, the very first sentence of the work is far from dry. It is stated that there were no parishes in the time of the Apostles, an argument for disestablishment which the writer in the *Review* could not have failed to pick up if he had ever even glanced at the book.

Only two objections have been stated to the appointment. First, the new Secretary being of a certain side in politics, the appointment was a job by persons of that political persuasion. In answer to which we have to state that the majority of the Commissioners are of the other side,—that the gentleman was nominated by one political opponent, and seconded by another. The second objection is that the new Secretary is an advocate. The objection is surely the most impudent one that ever was taken. Why should not a gentleman, who has the liberal education, the special knowledge, and the habits of business of a member of the bar in good practice, have as good a right to such an appointment as this as anybody else has? The truth of the matter is that every one who knew the learned gentleman wondered at his taking the appointment. But when it was known that he was willing to take it, the Commissioners chose to appoint him, and the election was all but unanimous. And the Commissioners were lucky indeed in being able to obtain the services of a man who had many and varied qualifications for the appointment—a good knowledge of law (and that is extremely serviceable in the capacity in which he will have to act), a great mastery over details, a great power of work and a love of it (there are such people), and a great knowledge of and delight in everything connected with ships and the sea, which last is not a disqualification, surely, for the Secretary

of a Lighthouse Board. A man may be perfectly qualified for such a place although he writes a law-book, and although he does not go lurching about in a nautical manner, hitching his trousers in the manner of a celebrated performer, and addressing the Court as "Avast, there, my Lord!"

We have no interest in the Commissioners and their appointment. They discharge important public functions, attended with a good deal of labour, and not attended with any remuneration whatever. They appointed the man whom they considered the best fitted for the place; and surely it may be thought that persons of position, upon whom a public responsibility rests, may have some little deference paid to their opinions. It is not in the interests of the Commissioners or of their Secretary that we write, but in the interests of the legal profession. We wish to ridicule the notion that because a man is a member of the legal profession he should not be eligible to be appointed to the secretaryship of a public Board. We trust there will be no more jabber of this kind for some time to come.

*Indian Honours to Counsel.*—Serjeant Ballantine is a fortunate man. For his defence of the Guicwar of Baroda he received the largest fee which any counsel has received for many years past, even in Election Petitions. But besides this, we read that on his departure from India the learned gentleman received many other tributes of respect,—to begin *ab ovo*, an "ovation," deafening cheers, a shawl, and an ode in Sanscrit, of which the following is stated to be a translation. It is a curious piece of literature, and is worth preserving. An old Irish beggar-woman could not have put on the blarney better, or at least thicker, on receipt of half-a-crown :—

"1. May that great Serjeant, who is come from a foreign country on the other side of the ocean, well-versed in legal lore, and himself as it were a great ocean, on account of his great learning, raise the good fortune and prosperity of his Highness the Guicwar, now involved in great calamity.

"2. O just and almighty God, if the people who serve his Highness with affection and sincerity be fortunate, may this splendid town of Baroda, enjoying great prosperity in former times, wearing a bustling appearance through her numberless elephants, risen on the coast of the ocean of prosperity, and adorned by the presence of a great number of actors, again occupy a very high position by regaining her former splendour.

"3. Seeing her face in the mirror of the snow-white hands of the Europeans, the opulent town of Baroda bewails the calamity of her ruler by shedding tears of pearls which are now in the hands of the Government.

"4. As the word Ballantine, according to Sanscrit, signifies a person possessing mighty strength, the town of Baroda is overwhelmed with joy, giving expression to her hopes in the following words :—

"May the great God prove my innocence, and restore me without loss of time to my prosperous condition. Amen."

The learned Serjeant was, so far, successful in his defence; and

it cannot be said that it is in consequence of the learned gentleman's being "a great ocean" that the Guicwar finds himself at present so very much at sea. The leading counsel for the Claimant in the second trial has had many addresses presented to him, some of them written apparently by himself; but nobody has yet attempted to translate them into English.

*Newspapers and Judges.*—On this subject an American journal has some remarks from which we extract the following:—"The recent attacks by the newspapers upon members of the judiciary in England and in this country, are evidences of a disposition on the part of the lay press to abuse its right of free speech, if not to trample upon justice itself. We have heretofore endeavoured to show the proper relations of the press and the bench; but such exhibitions of unjustifiable and unlicensed censure as those we have just seen in the newspapers, call for additional remarks upon the subject. And it may be well to premise that, in our criticism, we do not include the entire press of the country. For the greater portion of the newspapers seem to understand their rights and duties when dealing with matters pertaining to the administration of justice. It may be well also to state our unqualified approval of a temperate and enlightened discussion of the merits of judges, and of the soundness of their decisions. It is, too, one of the legitimate functions of journalism to expose venality and fraud, whether in the administration of legislative, executive, or judicial affairs. But it should be borne in mind, that one of the essential characteristics of the administration of justice is that it be free from reproach and suspicion. When the newspapers of any country begin to breathe suspicion and imputations upon the names of their judges, they must be first sure that they are right in their assertions and animadversions. It is a most reckless matter for a journal to impute unfairness or venality to a member of the judiciary without ascertaining, beyond reasonable doubt, the truth of the charges. The ease and freedom with which charges of judicial corruption and bias can be made by the newspapers, and the difficulty which attends the refutation of such charges, is another important consideration. Judicial etiquette requires that the judge should practically shut himself up from the ordinary controversies of men; for he does not know what questions may come before him for judicial determination. To engage in every newspaper controversy about his fitness for office, or his freedom from bias on great public questions of whatever character, has a tendency to compromise the dignity of the judicial office and lower the administrators of justice in the eyes of the people. A judge seldom or never can defend himself from newspaper attacks with good grace or good success. The absolute unfairness and inequality of an attack, by a respectable journal, on a respectable judge is perfectly patent to all who have considered the matter.

There is still another aspect of this question which is worthy of

attention. There are some newspapers which think judges carry with them, upon the bench, all the old associations and interests which they may have espoused during their career at the bar. If a judge has been counsel for an extensive concern, if he has been identified with any political party or movement, there is a constant endeavour to slur his motives and judicial acts when cases involving similar interests or possessing quasi-political aspects come before him for decision. Unquestionably a judge may be biassed by his antecedent career as counsel or politician; but there is no presumption to that effect, and the conclusion should not be drawn without irrefragable proof. If it were true that judges who have been politicians or counsel for extensive commercial or industrial organizations cannot act with impartiality when matters connected with such organizations, political, commercial, or industrial, come before them for adjudication, then we have no hope of ever securing a competent and impartial judiciary. For the very lawyers who, by their abilities and attainments, are entitled to the highest seats on the bench, are frequently identified with politics and with great industrial and business interests. No one advocates more ardently than ourselves the withdrawal of the judiciary from politics and from business; but we are not so impracticable as to attempt to secure a judiciary whose members were not formerly identified with any of the great political, commercial, and social forces which move the body politic.

"It is hardly necessary to state, that there never was a more unfair and discourteous, if not inconsiderate, attack by the newspapers than that of some of the New York and New England journals, upon the character of Chief-Judge Church and other members of our Court of Appeals. The present members of this court stand as high among the profession as any of those who have constituted it from its foundation nearly thirty years ago. We never have had a more able, industrious, and impartial appellate court, as a whole and in respect to its individual members, than now; and it is a disgrace to journalism that the imputations which have been thrown out by certain journals on such flimsy excuses have been allowed to go without anything more than a passing rebuke from the great majority of better-informed and better-tempered journals. And it is a humiliating sight when the Chief-Judge of the highest court of this State is compelled, by the force of public sentiment, to make an express denial of such baseless charges. For the sake of the dignity and sanctity of the judicial office, and for the sake of the intelligence and courtesy of journalism, we hope that this matter will not occur again."

Of late we have been plentifully treated to attacks upon the English Judges; certainly not by any respectable newspaper or by any respectable man. The miserable collapse of the charges made against the Judges, when the accuser was compelled to make his accusation in the House of Commons, or to drop it altogether,

everybody knows. The whole subject has got so tiresome that even a reference to it is tiresome too. But until the malady of mendacity and credulity has run its course, we must expect to see people rave and rant and madden round the land. It pays to do so. The late Angus Fletcher of Dunans used to tell a good story of a once well-known Scottish counsel. The counsel, whose *forte* was tediousness, was defending a Highlander at Perth. He spoke for a long time. The Judge, Lord Gillies, got restless on the bench. The Highlander observing this whispered to his counsel, "Fery goot, fery goot, that will do fery weel." But the unrelenting current went on, and the patient jury got restless in the jury-box. "Fery goot" was again the address, but no heed was taken to the interjection. Another course was tried. An appeal was made to Mr. Fletcher of Dunans, then a junior on circuit: "Dunans, Dunans, for Cot's sake stop that man; I feel the rope round my neck already." But still the speech went on. As a final and desperate effort the prisoner whispered, "Dunans, Dunans, you have always been a goot friend to the poor Highlandman. *Will a five-pound note stop that man?*" We fear that a £5 note will not stop this man so long as he can earn £40 a night in tolerably intelligent places, such as Edinburgh.

It is not in many periodicals, it is not by many persons that charges of unfairness are made against Her Majesty's Judges. But we observe in several newspapers a freedom of remark, an impudence of criticism, and a love of sensational reporting, which we do not think tend to keep up that sentiment of respect for the administrators of justice which has been a most precious and useful possession of the people of this country. This style of thing, of course, is much less obnoxious than coarse charges of corruption; but it operates in the same direction, and it is more insidious in its operation. It is Kenealyism *in petto*. The other day, Lord Deas was presiding as Judge in the Glasgow Circuit Court. Everybody in Scotland knows that his Lordship is one of the most able and learned of the Scottish Judges—indeed, that he is one of the most able and distinguished men in Scotland. Like other men of ability he has some humour in his character, and expresses his mind with pith and terseness. He did on several occasions at that Circuit express himself with pith and terseness; the consequence of which was—the newspaper consequence—that you saw on the newspaper placards, "Scene in Court;" when indeed there was no scene at all. And an Edinburgh newspaper had an article commenting on "justice in a rage," and so on. All this is simply intolerable. If nobody is to make a joke, if nobody is to say a pithy or smart thing because of the fear of the newspapers before his eyes,—if judges and counsel are to be muzzled, if they are to suppress every element of individual character, then the bench and the bar will cease to occupy that vivid place which they have been accustomed to take in the intellectual life of this country.

When a Judge takes the oath of allegiance, it is not allegiance to the reign of dulness that he means. It is of no avail to say, that reports, sensational and highly coloured reports, of little sparring passages and comments upon them help to sell the paper; and that it is necessary for people to live. We make the reply of Cardinal Richelieu, that we do not at all see the necessity.

*Constructive Murder.*—The case of the man Heap, tried at the last Liverpool Assizes, and executed at Kirkdale on Monday last, suggests again the infirmity of the law in reference to what are sometimes called constructive murders. Heap was a druggist, and, as was alleged, a licentiate of the Apothecaries' Company, and was tried for murder caused while attempting to procure abortion. The evidence suggested that he had killed the woman operated on, by puncturing her uterus with some sharp-pointed instrument, which brought on peritonitis, the proximate cause of death. He was found guilty, and sentenced to be hanged. The particular murder charged was an accident or casualty—a possible, but not an immediate consequence of the act or of the intention with which the act was committed. But the law declares it to be murder, and he was sentenced accordingly.

The defending counsel at the trial pointed out the anomaly of implying the intent to kill when every probable interest and motive of the criminal were opposed to such an intent, and that it was, in fact, to infer a design directly opposed to that which could be reasonably annexed to the act; but the learned judge, on the authority of the passages cited below in Russell on Crimes, vol. i. p. 740, 4th edit., left it as murder to the jury. The jury returned a verdict of guilty, with a strong recommendation to mercy, undoubtedly imposing on the Crown a task of some difficulty in determining how far the recommendation could be acted on, the man being an old offender, and having been previously sentenced to penal servitude for a similar crime.

We are induced to offer some remarks on the law of the case, because, as it seems to us, it is involved in some little doubt and perplexity, and is in part contradictory, and also because it appears from the newspaper reports that the execution of the criminal for this species of constructive murder caused an expression of sympathy with the condemned man in the neighbourhood in which he lived. The passages on which the counsel for the Crown relied are to be found in vol. i., Russell on Crimes, p. 740, 4th edit., 540, 3rd edit., and are as follows:

"So where a person gave medicine to a woman to procure abortion, and where a person put skewers into the womb of a woman for the same purpose, these acts were held clearly to be murder; for though the death of the woman was not intended, the acts were of a nature deliberate and malicious, and necessarily attended with great danger to the person on whom they were practised."

The authorities cited for this passage are 1 Hale, 429, and *Tinckler's* case; the first, a *Nisi Prius* decision of Lord Hale in 1670, the second reported 1 East P.C., pp. 230 and 354, but both were cases differing widely from the present, as in the first Lord Hale suggests that the woman killed had a live or quick child within her, and in the second, the acts committed argued a "deliberate and malicious" intent to injure the woman, rather than an attempt to procure abortion.

The learned Judge, however, appeared from the report to consider the proposition contained in the next passage sufficient:

"Whenever an unlawful act *malum in se* is done in prosecution of an unlawful intention and death ensues, it will be murder; as if A. shoot at the poultry of B., intending to *steal the poultry*, and by accident kill a man, this will be murder by reason of the felonious intention of stealing, Fost. 258, 259, Lord Coke, 3 Inst. 56, citing Bract. Lib. 3, 120 b." But even assuming this to be law at this day, as the learned editor of Russell (Mr. Greaves) in a note suggests, here there is an intention to kill—in pursuit of an unlawful act—and a misdirection of object only, and it is not therefore a parallel case.

For the prisoner it was upon this passage submitted that there must be an intent to kill, or some act from which such an intent can be reasonably inferred. That the intent might be inferred from a felonious act, which has as its probable consequence death, but not from an act which is only a felony in its consequences, and which implies a different purpose and another intent, and which really discredits the intent to kill. That it is not sufficient that there should be an unlawful or even a felonious intention, but there must be a felonious intention to kill, or to commit a crime of similar nature and motive, as in the instance cited in the footnote to Russell, 741, of burning a house with a man inside, in which the presumption is that killing is intended if the man is burned to death, and for this *Reg. v. Duffin*, Russ. & Ry. 365, and the doubt expressed by Lord Chief-Justice Cockburn in *Reg. v. Fretwell* (9 Cox C. C., at p. 153), were cited, and further, it was contended that, although the 24 & 25 Vict. c. 100, s. 58, makes the unlawful use of an instrument to procure miscarriage a felony, that such felony is merely statutable, and does not necessarily involve a felonious intention. That in point of fact it is a felony in its consequences and not in its intent, but that if every felony involves in its commission a felonious intent, in spite of express words to the contrary, it is not a felony *pari gradu* with those necessary to constitute murder. But the learned judge, after consulting Mr. Justice Field, considered there was nothing in the objections, and refused to reserve the point.

On turning to the authorities we find them in direct conflict, and are additionally puzzled by the various uses of the word "felonious," many differing from that now held. The word felony

"means a crime which involves a forfeiture," according to Stephens' Blackstone, v. 4, p. 7, quoted appropriately by Mr. Fitzjames Stephen in his treatise on Criminal Law. But whatever its historic derivation and present use, it is tolerably clear that it had a different meaning in the early history of English law, and one which in spirit at least accorded with that suggested by Lord Coke as *crimen animo felleo perpetratum*. The 52 Hen. III. c. 25 runs thus: "Murther from henceforth shall not be judged before our justices where it is found misfortune only, but shall take place in such as are slain by felony and not otherwise," indicating that then at least the suggestion of malice, aforesought, and design existed. (See also 5 Hen. IV., c. 5; 3 Edw. I. c. 12; 6 Edw. I. c. 9.) During the reign of Henry the Eighth, and Charles the Second, undoubtedly a great many offences were made felonies involving no felonious intent, as in transshipping yarn, sheep, wool, &c., casting nativities, declaring false prophecies, all felonies, as with respect to some of which the first statute of Mary protests; but if Mr. Stephens is right, a felonious design is not necessarily involved in the commission of a felony, as a man might commit an act without any other felonious intent than is implied in the words of the statute, and if a parity of reasoning is admissible, as murder can be committed without a murderous intent or an intent to kill, so a felony can be committed without a felonious intent or an intent to commit a felony.

But it seems to us that the *dicta* quoted from Foster, 258, and Coke, 3 Inst., cited above, were not considered law even in Lord Hale's day (Hale, vol. i, p. 475), as Lord Hale pronounces such killing to be manslaughter. Moreover, that there must be a felonious intent to commit a similar act, and that it was not the intention of stealing, but the intention of killing in furtherance of the stealing, that made the crime murder if it was at any time murder. That where there is no intentional killing, and death ensues, not as a natural or probable consequence, but merely as an incidental, and by misadventure, the mere unlawfulness of an act will not make that murder which would otherwise have been manslaughter at the most.

And with this agrees part of the opinion of Lord Chief-Justice Kelyng, in notes to *Rex v. Plumer* (Kelyng, 109), in delivering the opinion of all the judges in that case at pp. 116 and 117, "As the unlawful act ought to be deliberate to make the killing murder, so it ought to be such an act as may tend to the hurt of another, either *immediately* or by *necessary consequence*. . . . But if such unlawful act doth not tend immediately or by necessary consequence to the danger of another, though death ensue hereby, it is but manslaughter." And this is in reference to the use of weapons intended to hurt and injure, and not used primarily with a different intent; and with this agrees *Sir John Chichester's* case, (Aley 12), though that has been held to be hard law. And Lord Hale (vol. i. 475,



39) declares that if A., *without the licence* of B., shoots in the park of B., and his arrow glanceth from a tree, killeth a bystander, this is manslaughter, because the act was unlawful, which is in direct conflict with Coke 3, Inst. 56; and that if he throws a stone to kill the fowl of B., and the stone kills a bystander, it is manslaughter, the intention to steal making this offence murder, according to Foster, which again is negatived by Hale (p. 39, vol. i.), who declares it "homicide and felony" (Manslaughter, p. 425), but not murder.

From these and the other authorities, cited by Lord Coke, and the general tenor of Lord Hale's discourses on the point, we draw the conclusion that the dictum in the 3rd. Inst., adopted by Foster, is not warranted by the authorities vouched (Bracton, Lib. 3, 120 B.; 3 Edw. III.; 11 Hen. VII. 23), and was not accepted as law by Lord Hale; and that the reasoning above cited from *Rex v. Plummer* more correctly shows the law than the passages in the present edition of Russell on Crimes and Foster above cited. That Foster was incorrect in assuming that the mere attempt to commit a felony would suffice to convert manslaughter into murder, and that the unlawful act must be deliberate, and intended primarily to hurt another; and that if the intention to hurt is subservient, or there be no intention to hurt, and the hurt follows as a casualty, the offence is manslaughter and not murder. And, further, that when the sentence induces sympathy with the criminal as being excessive or misplaced—the fact that it is obnoxious and opposed to the ordinary reasoning of men—is a sufficient ground why a legal subtlety should not be followed, but that the law should be in accordance with common sense.—*Law Times*.

*Nature of the Contract of Agency.*—"An attorney," says the Lord Chief-Baron Comyns (Com. Dig., Attorney, A.), "is he who is appointed to do anything in the place of another." This definition states in a brief way the distinguishing feature of an agent's employment. An agent, then, is one who is duly authorised to act on behalf of another. The authority with which he is invested may be more or less limited, it may extend only to a single act, it may extend to all acts of a certain class, or it may extend yet further, according to the nature of the agency. According to the division of agents, which is based upon the extent of the authority they enjoy, agents are generally called special and general. But inasmuch as the different kinds of agency and the various divisions adopted will be treated of hereafter, no more may be said upon this head at present. The above definition of agency is generally accepted by text writers. "In the common language of life," says Story (Agency, s. 3), "he who, being competent to do any act for his own benefit, or on his own account, employs another person to do it, is called the principal, constituent, or employer; and he who is thus employed is called the agent, attorney, proxy, or delegate of the principal, constituent, or employer. The relation thus

created between the parties is termed an agency. The power thus delegated is called in law an authority."

In spite of the simplicity of the definition of agency, a thorough knowledge of the nature of the contract is absolutely necessary in order to grapple with cases that arise from time to time. One of the latest cases of this kind was the case of *Ex parte White; Re Nevill* (L. Rep. 6 Ch. App. 397; 24 L. T. Rep. N. S. 48), which is very instructive upon the question of the nature of the contract of agency. T. and Co., cotton manufacturers, were in the habit of sending goods to N., one of the firm of N. and Co., for sale. From the course of dealing the Court gathered that the goods were consigned by T. and Co. to N., accompanied by a price list. N. sent them monthly an account of the goods which he had sold, debiting himself with the price given in the price list, not specifying the particular contracts, nor giving the name of the purchasers, nor the price at which, nor the terms on which, he had sold. In the next month he paid to T. and Co. the moneys which were due to them in respect of the sales thus accounted for. Occasionally he had the goods bleached or dyed before he sold them, but gave no account to T. and Co. of the expense. In these dealings with T. and Co., N. acted on his own behalf, and not as a member of his firm; although, by an arrangement between himself and his partners, the moneys which he received from the purchasers of the goods sent him by T. and Co., were paid to the credit of the firm with their bankers to their general account. N. and Co. executed a deed of arrangement with their creditors. At the time of the execution of this deed there was a balance standing to the credit of N. in account with N. and Co. For this balance T. and Co. sought to prove against the joint estate in the hands of the trustees of N. and Co. It was argued on behalf of T. and Co. that the money was trust money belonging to T. and Co. This brings us to the question of the nature of the relationship which existed between T. and Co. and N. The Lords Justices held that this course of dealing did not constitute agency between them, and their judgment was affirmed on appeal to the House of Lords (29 L. T. Rep. N. S. 78). There is no magic in the word "agency," said Lord Justice James. That is, in the words of Lord Selborne, "the use of the word 'agent' in a general way, and without specially showing for what purpose Nevill was an agent, goes a very little way towards a solution of the question of this account; the facts must speak for themselves, and if those facts show a state of things different from a simple arrangement between principal and agent, then the effect of these facts will not be altered simply because the language of agency has been used in a loose manner." This case affords an excellent illustration of the way in which our courts of law will investigate mercantile relations that are said to constitute agency. The Lords Justices appear to have been influenced by the fact that Nevill

exercised without check certain rights of ownership over the goods consigned to him, rights which were inconsistent with the view that he was acting in a fiduciary character. Certainly if a consignee is allowed to alter the goods sent to him, if he may deal with them as he likes, and sell them at any price, and is liable only to pay for them at a price agreed upon beforehand, taking no regard of the selling price, it cannot with truth be said that he is an agent so as to allow the consignor to follow the proceeds of his sales. An analogous case suggested by one of the counsel was thought by the court to be an appropriate illustration. It was this: A publisher publishes for an author and sells for him, holding all the copies of the book. At some certain time he has to return to the author an account of all those sold, and to pay him for them at a fixed price, the publisher being at liberty to make his own bargains with retail booksellers. Here there is no relation of creditor and debtor, or vendor and purchaser between the author and the retail booksellers. Lord Justice Mellish is equally clear. His Lordship's judgment is valuable in that it brings into strong relief the distinction between a *del credere* agent and one "who is an agent up to a certain point."

With this distinction of the *del credere* agent, and the person who is an agent up to a certain point, we shall take leave of the subject for the present, assured that an examination of the case of *Ex parte White, re Nevill* will have had the effect of bringing out more or less clearly the true nature of the contract of agency. A *del credere* agent guarantees the performance of their contracts by the persons with whom he contracts on behalf of his principal. Now let us take the case of a man in the position of Nevill, and compare his relation to his consignors with that of a *del credere* agent to his principal. We are at once struck by the fact that there is no mention of such guarantee by N. of the performance of the contract into which third parties enter with him, as a *del credere* agent would give *ex vi termini*. On the contrary, he agrees to pay his principal a fixed price for the goods sent, and makes himself what he can of the bargain. Lord Justice Mellish puts the case in its proper light when he says, "If A. hands over his goods to B., and B. is to pay him a certain price if he sells, but is at liberty to sell on what terms he pleases, and B. then sells C., the natural inference from these facts is, beyond all doubt, that there is a sale made to B., and another sale from B. to C., and all the circumstances confirm the view that such was the nature of the dealing here.—*Law Times*."

*List of Law Agents.*—We have received an official list of enrolled Law Agents in Scotland, published by Mr. Green, law bookseller, Edinburgh. The list is certified by the registrar, Mr. F. S. Melville. It is printed as a single sheet, so that reference to any name is the work of a moment.

## Notes of English, American, and Colonial Cases.

**POWER OF APPOINTMENT.**—*Appointment to trustees for objects—Excessive execution—Custody of trust fund.*—A. by his will bequeathed a fund to trustees in trust for the children of his daughter B., in such shares and in such manner as B. should by will appoint, and gave his trustees usual powers of maintenance and advancement. B. by will appointed the fund to her children in certain proportions, and further appointed that the share of any minor should be paid to the trustees of her will, with powers of maintenance and advancement. B.'s children being infants, the question arose whether the appointed fund should be retained by A.'s trustees or handed over to B.'s trustees :—*Held*, that A.'s trustees were the proper parties to hold the fund and to administer the trust of B.'s testamentary appointment.—*Busk v. Aldam*, 44 L. J. Rep., Ch. 119.

**DAMAGES.**—*Negligence causing personal injury—Compensation received from insurance office.*—The damages in an action for negligence, causing personal injury to the plt., are not subject to any deduction therefrom of money paid to him by an insurance office under a policy of insurance against accident, as compensation for the same injury. *Bradburn v. Great Western Rail. Co.*, 44 L. J. Rep. Ex. 9.

**DAMAGES.**—*Measure of—Remoteness—Costs of litigation.*—B., a carrier, having contracted with H. to carry his pictures to Paris, made a second contract (containing different stipulations) with a railway company that the company should carry them to Calais. The pictures having been injured on the journey through the negligence of the railway company, H. brought an action against B. for the damage, claiming £1000. The railway company being requested by B. to defend the action, refused, repudiated all liability, and told B. he must deal with the action as he thought fit. B. defended the action, and H. recovered against him a verdict of £650 for the damage to the pictures. B. having sued the railway company to recover the costs he had paid and incurred in defending H.'s action,—*Held* (reversing the judgment of the Exchequer), that the two contracts, being different and independent, B. could not recover the costs, since they were neither the natural and proximate consequence of the railway company's default, nor incurred at the request of the company or for their benefit.—*Mors Le Blanch v. Wilson* (42 Law J. Rep. (N. S.) C. P. 70) overruled (*LUSH, J., dissentiente*). *Bacendale v. London, Chatham and Dover Rail. Co.*, 44 L. J. Rep. (Ex. Ch.) Ex. 20.

**MEDICAL ACT, 1858.**—*Medical practitioner registered at the date of trial, but neither qualified nor registered when services rendered—Right to recover.*—A licentiate of the Society of Apothecaries cannot recover his charges for advice and medicine in a case not requiring surgical treatment, where it appears that at the date of his services he did not possess his qualification, and was not registered under the Medical Act, 1858 (21 and 22 Vict. c. 90), s. 15, though he is so registered on the day of the trial of the action.—*Loman v. Houseley*, 44 L. J. Rep., Q. B. 22.

**NEGLIGENCE.**—*Certificated Manager of colliery—Liability of master.*—The owners of a colliery who have appointed a certificated manager under the Coal Mines Regulation Act, 1872 (35 and 36 Vict. c. 76), s. 26, are not liable for an injury to a workman in the colliery caused by the negligence of the manager, as there is nothing in the statute to make him other than fellow workman of the person injured.—*Hovells v. Landore Siemens Steel Co.*, 44 L. J. Rep., Q. B. 25.

**NEW TRIAL.**—*Inadequacy of damages—Compromise amongst jury—Slander.*—A new trial will be granted for inadequacy of damages in an action for slander where the smallness of the amount shows that the jury have made a compromise, and, instead of deciding the issues submitted to them, have agreed to find for the plaintiff for nominal damages only.—*Falvey v. Stanford*, L. R., 10 Q. B. 54.

## The Scottish Law Magazine and Sheriff Court Reporter.

### SHERIFF COURT, ABERDEEN.

Sheriffs GUTHRIE SMITH and DOVE WILSON.

WILLIAM GIBB v. J. AND J. CROMBIE.—4th December 1874 and 16th February 1875.

*Negligence—Damages—Factory Acts.*—This was a case at the instance of William Gibb, residing in Woodside, against J. & J. Crombie, manufacturers, Grandholm, for £250 of damages in consequence of the pursuer, who was in the employment of the defrs., and was a "young person" within the meaning of the Factory Acts, having on 2nd April 1873 been struck and severely injured by a belt of a wool-tearing machine at which he was then working having broken—which belt was insufficient for the purposes to which it was being applied by the pursuer, the machine also being defective in the bushes and other parts thereof, and being further unfenced, all of which contributed to the said accident happening to the pursuer. The pursuer averred that the bushes and other parts of the machine were completely worn away, that the spout shaft was not true or level, that the machine and the belt connecting it with the main shaft were old, and had been repaired till they could be repaired no longer. The belt, by reason of its said condition, was apt to fly off from the machine and to snap asunder; had, indeed, frequently slipped; and numerous complaints had been made about it to the defrs. and their foreman. On the occasion libelled the belt flew off the face-pulley of the machine and caught the pursuer, and dragged him along until it broke. The pursuer sustained a compound comminuted fracture of the right arm, which had subsequently to be amputated, and he was laid aside from work for upwards of seven weeks.

The defrs. averred, in reply, that the machine was in every respect sufficient for the purposes for which it was being used, and was in thorough repair; that the pursuer had been instructed to work it, and had been working it for some weeks, during which he made no complaint as to its insufficiency; that the accident occurred through the fault of the pursuer in laying hold of some part of it or its gearing while in motion; and that, he having on many previous occasions raised a false alarm by crying out and otherwise, his fellow-workers on this occasion did not go to his assistance so soon as they would otherwise have done. The defrs. also further averred that the pursuer, who was employed as a night-worker, had, when seeking employment, represented himself to be 18 years of age, and on the faith of these representations the defrs. employed him as an adult—i.e., as a person beyond the age of "a young person" in the sense of the Factory Acts—and paid him accordingly.

After evidence was taken, the following interlocutor was pronounced by Sheriff Dove Wilson:—

"Aberdeen, 4th December 1874.—Having considered the cause, Finds that at the time the injury libelled was sustained the pursuer was a young person within the meaning of the Factory Acts, and was, in breach of their provisions, employed by the defrs. at night-work and at unfenced machinery: Finds that the injury happened in consequence of his being so employed: Finds that the defrs. have failed to prove that the pursuer was so employed through his own fault, or that his own negligence contributed to the accident: Finds, therefore, that the defrs. are liable in damages: Modifies the same to the sum of £100 sterling, and decerns for said sum against the defrs.: Finds the defrs. liable in expenses, &c.

J. DOVE WILSON.

"*Note.*—I do not think that any ground is made out at common law for attaching liability to the defrs. Under the decision of Lord Chancellor Cairns, in the case of *Weir or Wilson v. Merry & Ovinghams* (29th May 1868, 6 M. (H. L.)), the law as to the liability of a master for accidents happening to the servant is laid on the broad and intelligible ground that the master is not liable, unless

it can be shown that he was negligent in the performance of some duty which he had undertaken to the servant to perform. In the present case it is apparent that the defra. did not undertake personally to superintend the details of the machinery. It would have been impossible for them to do so. All that their servant could expect would be that the defra. should provide competent workmen and a due supply of materials to keep their machinery in order. These duties the defra. appear to have discharged with liberality, as there does not appear to have been even a complaint made to them by their servants on the subject. If the case, therefore, stood on the common law, and were one between an adult and the defra., it would seem to me to be clear that the defra. would fall to be assoltied. As illustrations of the application of the principle of *Wilson v. Merry & Cuninghame* to circumstances somewhat resembling the present, I may refer to the cases of *Balleny v. Cree* (23rd May 1873, 9 M. 626) and *Searle v. Lindsay* (22nd November 1861, 31 L. J. (C. P.), 106).

"In the present case, however, two statutory duties have been disregarded. The pursuer was a young person under eighteen years of age, and in respect of such persons it is provided by the Factory Acts—firstly, that they shall not be employed during the night; and, secondly, that the machinery at which they are to be employed shall be fenced. As to the first of these provisions and its breach there is no room for question. The obligation is contained in the Act 13 & 14 Vict., cap. 54, sec. 1. The breach is proved by the certificate of the pursuer's age, showing him to be under eighteen, and by his having, notwithstanding this, been employed in the night shift. The second statutory duty is contained in the Act 7 & 8 Vict., c. 15, sec. 21, as amended by the Act 19 & 20 Vict., c. 38, sec. 4. Under the first of those Acts it was held that all machinery had to be fenced, but the second Act restricted it so as to make the obligation to fence applicable only to the machinery with which women, children, or young persons are liable to come in contact. The machine at which the pursuer was employed was unfenced, and it seems to me that this constitutes a breach of the second statutory duty. It is no answer to the statutes to say here that such machines are never fenced, or that young persons are not intended to be employed at them. The statutes cannot be construed so as to permit the occasional employment of young persons at unfenced machinery; and so long as a young person was employed at the machine in question, it fell within the statutory provisions as to fencing. The mere fact of such employment brings it within the statutes.

"To the action, as one laid for a breach of the statutory duties thus explained, various defences have been pleaded. These defences seem to me capable of being reduced to the three following propositions:—(1) that the breaches of the statutory duties give rise merely to claims for penalties, and do not authorise actions of damages for resulting injuries; (2) that the breaches of duty in this case occurred without fault on the part of the defra., and in consequence of fault on the part of the pursuer; and (3) that the accident did not result from the breaches of statutory duty, but from the fault or negligence of the pursuer at the time when it happened.

"(1) The defence that breaches of the statutory duties, though they may render the breaker liable to various pecuniary penalties, cannot give rise to a claim of damages, has been negatived by decisions already pronounced. In *Conck v. Steel* (18th Jan. 1854, 23 L. J. (Q. B.) 120) it was held that where a public duty was laid on any one by statute, damages caused by its breach might be recovered in addition to the penalty. That case was laid under a statute relating to merchant shipping, but in *Caswell v. Worth* (18th Jan. 1856, 25 L. J. (Q. B.) 121) it was held that the same rule applied to the Factory Acts. The rule has been followed in several cases since. As the duty is by the Factory Acts laid on the occupiers of the mill, it is a resulting peculiarity of claims of damages under the Factory Acts, distinguishing them from claims at common law, that the occupiers of the mill are personally responsible for the breach and are debarred from the benefit of any plea that the breach was committed by their managers, without personal fault being attributable to themselves;

The person on whom the statute lays the duty is answerable for the damage done by the breach. Whether in the cases in which the occupiers have, under the Acts, recourse for the penalty against a defaulting manager, they might not also have recourse for the damages awarded, may be a question, but there is no question but that between the injured party and the occupiers the latter are liable.

"(2) The defence that the breaches of the statutory duty in this case were not the defra.' but the pursuer's fault, raises the question whether the pursuer can be blamed for undertaking the employment. In considering this, the relative positions of the pursuer and the defra. must be kept in view. The pursuer, although he happened to be within six or seven months of eighteen, and thus possessed almost the same discretion as if he had been of full age, was as much a young person, under the Factory Acts, as if he had been barely thirteen; and under the Factory Acts the duty of keeping the statutory provisions in question is laid distinctly on the employer, and upon him only. It seems the Legislature has thought that from young persons of tender years, neither a knowledge of the statutes, nor the discretion necessary to understand the importance of keeping them, was to be expected. Had the pursuer been 14 years of age, a plea that he knew the statutes and voluntarily undertook the risk of disregarding them, could not have been maintained, and I see no ground on which a distinction can be drawn in this respect between one young person and another. It might have been different had the defra. been able to maintain that they had been fraudulently misled as to the pursuer's age. There is, however, no satisfactory evidence that the pursuer even said he was 18, and, moreover, I doubt much if even such a statement would have protected the defra. In a prosecution for the statutory penalty it is plain that it would not. Under the 65th section of the Factory Act of 1844, the defra. would not escape unless they proved at the trial that the pursuer was truly 18. It would perhaps be going too far to make this the test of civil responsibility, but I can see no ground for escape for the defra., unless they could at least show that they had made diligent inquiry as to the pursuer's age, and were (notwithstanding) misled through some fraud on the pursuer's part. Merely asking the pursuer is truly no sufficient inquiry. One subject of the statute is to protect young persons against themselves, and the temptation to falsehood in the chance of getting higher wages might be so irresistible as to make the inquiry at the party himself practically worth nothing. There is no attempt in this case to prove anything beyond such an inquiry. Although the pursuer's relatives lived in the neighbourhood, no inquiry was made at them; and although a certificate of his birth, as the sequel has shown, could easily have been got, it was not asked for. No doubt the Factory Acts do not specify either of those modes of proof, but under those Acts the defra. were liable to the penalty, unless they proved the age. The provisions of the Factory Acts seem to me so stringent as to leave no escape for the defra., unless it were at least proved that they or their managers did everything which it was possible to do to obey them, and that they took every possible precaution to be certain as to the pursuer's age. It appears that the defra.' managers, who employed the pursuer, were to some extent misled by his having been previously at night-work in the employment of a paper-maker, but the inquiry at those works may also have been perfunctory; and, besides, there appears to be in the Factory Acts a power to papermakers, in certain circumstances, to employ young persons at night. In conclusion, in regard to this defence, I think, although not without hesitation, that it is insufficient—firstly, because the statutory duties are laid on the defra., and it is not proved that they or their servants did everything which it was possible to do in order to obey them; and, secondly, because the statutory protection is given to the pursuer, and it is not proved that he committed any fraud by which it ought to be forfeited.

"(3) There remains the question whether it was the breaches of duty, or some fault or negligence on the part of the pursuer at the time, which caused the accident. It is clear that negligence on the pursuer's part would bar his claim

(*Casswell v. Worth*, quoted *supra*, 18th Jan. 1856, 25 L. J. (Q. B.), 121), and that he would not escape from its consequences by reason of his being a young person. (*Abbot v. Macfie*, 7th December 1863, 33 L. J. (Ex.) 176.) *Prima facie*, the accident looks as if it had been caused by the breach of the statutory duties. It happened to a young person at the end of a night's work for which his capacity must be taken to have been insufficient, and from unfenced machinery, of which he must be presumed to be unfit to have the control. In these circumstances, it is reasonable to ask for some proof of negligence on the pursuer's part. What is said is, that the pursuer must have been 'tampering' with the machine. It is not suggested that through mere mischief he was meddling with machinery he had no business with, or was playing tricks with his own machine. What is suggested is that, although he had often been warned not to do so, he was trying to adjust the belt, after it had flown off, without first stopping the machine. Whether the accident happened in this way, or in the way the pursuer describes, there is no positive evidence sufficient to decide; but assuming that the defra' theory was true, it was at most an indiscretion committed by the pursuer in attempting to perform his duty, and it was precisely the bad consequences of such natural indiscretions on the part of young persons which the Legislature must have desired to prevent when it prohibited their employment at dangerous work. In considering what is negligence or misconduct on his part, the capacity of the pursuer must always be kept in view. Even in an adult, doing a thing merely in the knowledge that it is dangerous is not of itself proof of negligence. (See *Britton v. Great Western Cotton Co.*, 29th Feb. 1872, 41 L. J. (Ex.) 98, in which an adult got damages though he knowingly undertook to work at unfenced machinery.) In the case of a young person, it is much clearer that a similar thing amounts to no more than an indiscretion.

"On the whole matter, I am of opinion, for the reasons I have stated, that no sufficient answer has been made to the pursuer's case, in so far as it is laid on the Factory Acts, and therefore that damages are due. J. D. W."

This judgment was taken to review, and the following interlocutor was pronounced:—

"*Edinburgh*, 16th February 1875.—The Sheriff having considered the reclaiming petition for the defrs. against the interlocutor of 4th December last, with the answers thereto for the pursuer's proof, productions, and whole process, sustains the appeal, recalls the interlocutor appealed against: Finds that it is not proved that the injuries of the minor pursuer were caused by any want of fencing or other defect in the machine in question, for which the defrs. are responsible: And in respect it appears that they had used all due diligence to enforce the provisions of the Factory Acts, they are not liable to the pursuer or his father for his being employed at nightwork under eighteen years of age, contrary to the requirements of said Acts: Therefore assoilzies the defrs. from the conclusions of the summons: Finds the pursuer liable in expenses, allows an account thereof to be given in, and remits the same to the auditor for taxation, and decerns. J. GUTHRIE SMITH.

"*Note*.—With the consent of the parties the Sheriff went to the defrs.' mill to see the machine at which the accident occurred. It is a teaser of the description usually found in woollen factories, standing by itself in a part of the building specially devoted to this kind of work, with abundance of room for the person in charge to move about. In accordance with the usual arrangement, the body of the machine, which is its most dangerous part, is all boxed in, and a slide opens and shuts at the end where it is fed and discharged.

"The fan which blows away the dust from the wool in the process of teasing is driven by a belt at the side, passing round the drum, and it was this belt which caused the accident. The pursuer says he had been oiling the fan, and was in the act of returning 'when the belt sprang, caught his right arm, and before he knew where he was had it round the drum.' He is the only witness to the occurrence, and it is not easy to understand how the accident could have



happened in the way described ; for, first, there was no need for his being so close to it ; and, second, the strap of the upper pulley, which passes round the axle of the drum, and is on the outside of the fan strap, must necessarily have acted as a fence in keeping the latter in its place in the event of its slipping off. The more likely explanation is that the strap having slipped, the pursuer was trying to put it on without first stopping the machine, which it is admitted was contrary to orders, and, indeed, would be a most dangerous proceeding. If this is how it happened there is plainly an end of the case ; for, all question of fencing apart, a master is not liable to a workman himself for the consequences of his own folly, at least when he possesses the intelligence which may be supposed to be possessed by a lad of 18. While the Factory Acts make fencing in certain circumstances a matter of statutory obligation—the omission of which both subjects the offender to penalties and entitles the injured party to redress—it has been laid down in each of the three kingdoms—‘That the action must be subject to the rules of common law, and one of these is that a want of ordinary care or wilful misconduct on the part of the plt. is an answer to the claim.’—*Caswell v. Worth*, 5 Cl. and Bl., 849 ; *Trailis v. Small & Boase*, 11 Macph., 888 ; and an Irish case—*McCracken v. Dargen*, 1 Ir. Jurist, N.S., 404.

“The pursuer, however, denies that he was touching the strap at the time, and a large body of evidence has been led on the question whether anything could have been done by the defra. to prevent such an occurrence as the pursuer says did happen on the occasion. As regards the mill gearing, meaning thereby the train of toothed wheels at the upper part of the side of the machine, any further protection was evidently unnecessary, because they are practically out of anybody’s reach ; and, although no doubt the term is defined by the Act of 1844, section 73, must be held to include every ‘wheel, drum, or pulley’ by which motion is communicated from the moving power to the different parts of the machinery. Two observations fall to be made on the provisions of the statute relating to fencing. In the first place, these parts of the gearing only now require to be fenced ‘with which children, young persons, and women are liable to come in contact, either in passing or in their ordinary occupation in the factory’ (19 and 20 Vict., c. 38, sec. 4). In the second place, so far as the Sheriff is aware, the term has never been held to apply to belting. That is specially dealt with in the Act, the inspector being empowered to direct any driving strap or band, which in his opinion is dangerous, to be fenced ; and, in the event of a difference of opinion between him and the millowner whether it is necessary and possible to do so, the question is referred to arbitration (7 and 8 Vict., c. 15, sec. 43, sec. 60, and 19 and 20 Vict., c. 38, sec. 6). Now, it is abundantly proved that the risk of injury from young persons coming in contact with the strap in question never occurred to any one ; that in similar establishments it is not customary to have any special protection at this part of the machine ; and no instance is mentioned of any factory inspector having deemed it his duty to interfere. Upon these facts, the Sheriff has no difficulty in holding that the guarding of the fan belt is not made matter of statutory obligation, and, as regards the alleged liability of the belt to slip off from the looseness of the bushes, the pursuer has entirely failed to show that any defects which may have arisen from wear and tear were directly connected with the accident.

“The remaining ground of action pleaded for the pursuer is that, the accident having happened at night, the defra. took the risk of it, because the pursuer, being under 18, ought not to have been allowed into the mill after 6 p.m. It seems to be a sufficient answer that he was employed as an adult, at an adult’s wages, and in the belief that he was an adult in point of fact. The pursuer came asking night-work from another work where he had been working on the night-shift. Young persons employed by day get from 7s. to 10s. a week, adults, by night, 14s. and upwards ; and the pursuer received 15s. While, therefore, his motive for passing himself off as being four or five months older than he really was is intelligible, it is impossible to understand what object the

defra. had to gain by wilfully breaking the law. Mr. Brooks says that he expressly asked him his age before he was engaged. This the pursuer denies, but it is not disputed that the question was repeated in a different but much more formal manner some time after he had obtained admission to the defra. mill. Having reason to suspect that some of the night hands were under age, they caused a general muster to be made, and, the whole being passed through Mr. Crombie's room, every one about whose age there could be a doubt was expressly asked the question. That the examination was particular is proved by the fact that it resulted in a number of dismissals, including the pursuer's companion (Ross), who succeeded, along with him, in passing Brooks at the time of the engagement. At the above muster, the pursuer again denies that he was asked his age; but, if the question was not put in so many words, he must have quite well understood the object of the proceeding, and that to be found out meant being turned out. A factory hand of 18 is far too intelligent not to understand that. To give him damages for having successfully eluded detection on that occasion, notwithstanding that the defra. were doing their best to comply with the law, on the ground, forsooth, that 'young persons' like him require protection against themselves, and that this was the object of the Factory legislation, would be bringing the matter to a point which is in violation of the plainest equity, and never could have been contemplated. J. G. S."

*Act.—O. Prosser.—Alt.—D. Littlejohn.*

#### Sheriff COMRIE THOMSON.

H. G. LUMSDEN v. DAVID SOUTER AND JOHN ROBERTSON.—10th April 1875.

*Herding Acta.*—This was a case in the Small Debt Court at the instance of Hugh Gordon Lumsden, Esq. of Auchindoir, against David Souter, farmer at Buck, and John Robertson, farmer at Muckle Bodiebrae, both in the parish of Cabrach, for £8, 1s. 1d., in terms of the Act of Parliament of Scotland, 1686, Chapter II., being the amount payable to him at the rate of half a merk of Scots money (being sixpence and two-thirds sterling) for each sheep of a flock of 290 sheep belonging to the defra. which they had, on the 24th December 1874, trespassing and going on the face of the Hill of John's Cairn, below the Well of the Wood, in the parish of Auchindoir, belonging to the pursuer, and forming part of his estate—Clova—said sheep not having been herded as required by the said Act. The following is the interlocutor of the S.-S.:—

"This is an action brought under the old Winter Herding Act of 1686. It concludes for payment of £8, 1s. 1d., being at the rate of half a merk Scots money for each sheep of a flock of 290 sheep which is alleged to have trespassed on the pursuer's ground, and in respect of which trespass the defra. are said to be liable in the penalties of the statute.

"What is proved is this, that in the end of December, when snow was lying somewhat deeply on the hills, the defra. sent the sheep in question from the upper part of the Cabrach in the hope of their at once reaching certain low-country pasture which they had taken for them in Auchindoir. The sheep started on a Tuesday, and it is admitted that on Wednesday afternoon they were on the ground libelled, which belongs to the pursuer, and which is probably not more than four miles from the place from which they had started. They remained on the pursuer's ground till Thursday. It has been established that the shepherd followed so far as he could an old track, and although the sheep when found by the pursuer's servants were not upon that track, yet the snow afforded a very good excuse for the road being missed. The snow also prevented the sheep from proceeding, at least without risk. It is not averred that the sheep did any damage whatever to the pursuer's ground. It is a pure case of trespass without damage. To such a case the statute undoubtedly applies in certain circumstances—that is to say, penalties may be recovered, as well as and in addition to damage, for injury which may have been sustained. The

question is whether the present case is of the class contemplated by the statute. I am of opinion that it is not, and for these reasons.

"The 'consideration' upon which the Act proceeds is 'the prejudice and damage which the lieges do sustain in their planting and enclosures, whereby the young trees and hedges are eaten and destroyed;' and the end which the Act contemplates is, that cattle, sheep, &c., 'may not eat or destroy their neighbours' ground, woods, hedges, or planting.' The ground here was a heathery hillside. It was neither planted nor enclosed, and therefore no woods or hedges or planting of any kind could have been eaten or destroyed by the defra. sheep. It is quite true that there is a clause in the statute which may be held to imply that grass is intended to be protected by it. That is not the leading object of the enactment, however, and on the most liberal construction of its terms I am of opinion that the bare act of trespass is not what is struck at, but trespass accompanied with eating or destroying of trees or hedges, or damage done to grass. As I have said, no damage whatever is alleged here, except the act of trespass. I may refer the parties to a case in this Court in 1870, in which judgments were pronounced by the late Sheriff Jameson and myself, and which is reported under the name of *Gordon v. Grant* in the 14th volume of the *Journal of Jurisprudence*, p. 476. There will be decree absolvitor, with costs against the pursuer."

*Act.—B. Davidson.—Alt.—O. Prosser.*

## PERTH SMALL DEBT COURT.

Sheriff BARCLAY.

*A. v. B.—2nd April 1875.*

*Liability for School Rates.*—This was an action wherein the question was raised, whether an obligation in a lease by a landlord to relieve his tenant from schoolmaster's salary was abrogated by the Education statutes substituting schoolrates in place of schoolmaster's salary. The S.-S. decided for the tenant, explaining his reasons in the following note:—

"*Perth, 2nd April 1875.*—This action is to recover £6, 0s. 5d., being balance of rent for crop and year 1873. It is admitted that the balance of rent has been retained to meet the 'school rates' for the same year, paid by the defr.—the tenant—and from which he maintains the pursuer—the landlord—is by lease bound to relieve him. The clause in the lease is very awkwardly framed, and is in these terms—'And the tenant obliges himself to pay all road-money, public, parochial, or other burdens imposed on said lands, and payable by the tenant or occupant (cess, minister's stipend, and schoolmaster's salary excepted).' The first section of this clause binds the tenant to pay what by law he was bound to pay, and therefore is wholly surplusage. It is proper to state that it was explained by the solicitor of the landlord that this strange clause had its origin by the agent for the tenant on revival of the draft-lease having added the words, 'and payable by the tenant or occupant,' which had no place in the other leases prepared in the same office. The addition wholly changes the extent of the allegation. As the clause originally stood the tenant is taken bound to pay *all* burdens on the lands. As altered he becomes bound only to pay such portion as is by law imposed on the tenant. The exception relieves the tenant from that obligation so far as relating to minister's stipend and schoolmaster's salary, but is wholly silent as to which party the excepted burdens are to be paid. The exception of the 'minister's stipend' is very strange, as no part of such has ever been by law imposed on the tenantry. It may, however, afford a key to explain the next term of 'schoolmaster's salary.' It is said that the exception was intended to place the whole of the schoolmaster's salary on the landlord instead of only one half as by law imposed. This interpretation of the clause is confirmed by the fact that hitherto

the landlord has paid the *whole* instead of the half imposed on him by law. This may be explained by the other fact, so highly honourable to the landlords of Perthshire, that generally, before the passing of the recent statute, they paid the whole of the schoolmaster's salary, and did not ask the half from their tenants as they might have done.

"The pursuer's contention now is, that the assessment formerly known and described in the lease as 'schoolmaster's salary' is no longer in existence; that 'school rates' is an entirely new tax, under a subsequent statute, and which falls to be levied and allocated in terms of the recent Education Act, and therefore supersedes the covenant contained in the lease. The general rule in questions of relief is that the clear intention of contracting parties must rule any obscurity in the expression of such intention. Where a special tax is obviously meant to be included, then any increase in its amount, or variation in its mode of levy or management, does not exclude from the benefit of the clause. But should there be a new tax introduced, which could not be foreseen, such could not be in the view of the parties, and so is excluded from the general cause of relief. The parish school is one of the most ancient of our national institutes, and on all hands is admitted to have been the source of much of the prosperity of Scotland. The Acts 1663, cap. 16, and 1696, imposed the schoolmaster's salary on heritors and tenants according to valued rent. These statutes have been followed by many modern enactments by which the burden was frequently much increased, and its application extended: 43 George III.; 17 and 18 Vict., cap. 78; 20 and 21 Vict., cap. 59; 24 and 25 Vict., cap. 107. Notwithstanding these repeated variations and extensions of the educational fund and machinery, there never existed a doubt but that they formed but parts of the one grand national school institute of Scotland. The question now arises whether the recent Educational Act, 35 and 36 Vict., cap. 62, upsets the entire scholastic law of ages, and has introduced for the first time an educational system hitherto unknown and unrecognized, and which could therefore not have been foreseen by parties entering into contracts anterior to the date of the enactment.

"The recent Act, so far from ignoring or repealing the ancient statutes, narrates them, and then introduces the improved system, with the narrative that 'it is desirable to amend and extend the provisions of the law of Scotland on the subject of Education in such manner that the means of procuring efficient education for their children may be furnished and made available to the whole people of Scotland.' By the 23rd section of the Act, parish schools and parish schoolmasters are expressly recognized, and dealt with as important and essential parts of the new system. No doubt the schools are henceforth to be recognized as 'National' rather than 'Parochial' schools, though in point of fact many parishes will only still have their one time-hallowed school. The management is (for good or evil remains yet to be seen) henceforth vested in other hands, but still in fact marked by Parochial divisions. The former statutes are only repealed in so far as inconsistent with the new law, and there is no inconsistency in existing contracts between landlords and tenants made under the former law remaining untouched by the new. The assessment is now known as 'school rates,' instead of 'schoolmaster's salary.' There are provisions for regulating in future the schools. These are more varied and extensive than effected by former statutes, though each in succession made great extensions of original provisions, but the recent statute by no means changed the single aim and object of the law. It still is the education of the people by a public tax. The schoolmaster of necessity is still the vital element of the system. Therefore 'school rates,' in every true sense, is the equivalent and synonym of 'schoolmaster's salary.'

"The pursuer supported his plea by reference to the case, 25th June 1850—*Scott v. Edward*. This case was one of difficulty, and in consequence was laid before the whole Court. The taxes forming the subject of discussion in that case were 'Prison and Police Assessments,' which, up to the dates of the respective enactments, were unknown in Scotland, and therefore could not pos-

sibly have been in the foresight of the parties when they entered into the contract of release from public burdens. The defr., the tenant, on the other hand, referred to the case, 16th July 1858, *Hunter v. Chalmers*. In that case one party bound to relieve another from 'poor's rates' endeavoured to escape from further liability because of the 'Poor Law Amendment Act.' That statute made a far greater change in the whole system of the poor-law than the recent Education statute introduced on the educational system of Scotland. The Court, however, unanimously held that the liability remained as before. These two cases are instructive of the general principle that where it is clearly intended that a party is to be relieved from a certain public burden then in existence, no mere change in its name or management can operate as relieving from obligation. But, on the other hand, where entirely new taxes are introduced which had no prior existence, these could not have been in the contemplation of the contracting parties, and therefore cannot be brought within the scope of the contract.

"The S.-S., therefore, has no hesitation in holding that the landlord's obligation as shown by his uniform practice of relieving the pursuer, his tenant, from the schoolmaster's salary, continues to relieve him from school rates."

*Act.—William Chalmers.—Alt.—Henry Gordon.*

#### SMALL DEBT COURT OF LANARKSHIRE, GLASGOW.

Sheriff GUTHRIE.

QUEEN v. DARRIE AND HADDON.—16th April 1875.

*Reparation—Master and Servant—Collaborateur—Different Contractors engaged in Common Work.*—The whole case is stated in the following judgment:—

"The pursuer in this case is a bricklayer's labourer, employed by the contractor for the brick work of a school that is in course of erection in Hozier Street, Bridgeton, and the defrs. are the contractors for the slater work and the plumber work respectively of that building. The pursuer claims reparation for injuries sustained by him through the fall of a ladder on 1st March last. The ladder was used by the slaters, who were working at the roof of the house, and had originally been properly secured by them by means of a rope passed through the window to the joists. In the course of the afternoon the slaters had left their work on the roof and were dressing slates at the end of the house, leaving the ladder as it had been while they were using it. It appears that the rope by which it was secured was not the property of the slaters, but belonged to the plumber, the defr. Mr. Haddon; and at the time when the slater's men were dressing the slates, he sent an apprentice for his rope. The boy went up and took the rope away from the ladder; and shortly after the ladder fell, probably in consequence of a gust of wind, and came against the head of the pursuer, causing him considerable injuries.

"There is a conflict of evidence upon one point, namely, whether the plumber's apprentice gave notice to the slaters that he was going to take away his rope, but I came to the conclusion on Wednesday, upon the whole evidence, that notice was given to those men; so that, unless there is a sufficient defence on point of law to which I am about to refer, Mr. Darrie, the slater, who is called as a defr., is liable for the damage done to Queen, the pursuer.

"These are the facts of the case; and so far it is not attended with any difficulty, for I think that the defr. Haddon was entitled to remove his own rope, and that in giving notice to the slater's men that he was about to do so, his boy did all that was incumbent on him, and threw upon these men the responsibility of protecting the other workmen on the premises from danger.

"But it was argued by Mr. Mackenzie, for the defr. Darrie, that the pursuer was engaged in a common employment with the defrs.' men, and that the defra.

were therefore exempt from liability for the fault of their employés—under the well-known rule as to fellow-servants or collaborateurs. It was contended that the fact that the pursuer, and the party whose fault caused the accident, were engaged in working for a common object—the erection of a house—is enough to bring that rule into operation. I was referred to the case of *Wiggett v. Fox*, 2 E. Jur. N. S. 955, where there is a strong dictum by Baron Alderson, tending in this direction; and, as I think that litigants in the Small Debt Court ought to have these cases decided with as much regard to the principles of law as any other litigants, I delayed the case till to-day that I might examine the authorities. It is true that there are various dicta by English judges by which the broad principle contended for by Mr. Mackenzie might be supported. But when these dicta are read with reference to the subject-matter of the cases, I think they must all be taken to apply to a state of facts where the parties were employed by the same master. And when I turn to our own books, there is a series of very recent cases (*Gregory v. Hill*, Dec. 14, 1869, 8 Macph. 282; *Wyllie v. Cal. Ry. Co.*, Jan. 27, 1871, 9 Macph. 463; *Calder v. Cal. Ry. Co.*, June 16, 1871, 9 Macph. 833; comp. *Abraham v. Reynolds*, 5 H. and N. 149; *Waller v. S. E. R. Co.*, 32 L. J. Ex. 205), in which the employer's exemption from liability is distinctly confined to cases in which he is the employer both of the injured party and of the person who was the direct cause of the injury. These cases state the principle to be, that the employer's normal responsibility for the faults of his servant committed within the sphere of his employment, does not make him liable for injuries done by such faults to a fellow-servant engaged in the same work, because it is an implied condition of each servant's contract, and part of the consideration for which he receives wages, that he takes the risk of all danger incident to the common employment, save what is held to be due to the master's personal fault, e.g. in choosing an inefficient workman, or using defective machinery. Now it is obvious that in such a case as this there is no contract at all between the pursuer and the defrs.; and therefore, as the law is laid down, there is no room for implying such a condition. The pursuer was employed by the contractor for the brick-work and got his wages from him; and there was no contract relation between him and either of the defrs., into which any such implied term could be introduced.

"It may be somewhat anomalous that in such a case as this the law should hold each of the contractors for the erection of a house—the bricklayer, the carpenter, the slater, and plumber—exempt from liability for injuries done by his workmen to other workmen in his employment, but liable for all injuries arising from their negligence to the workmen employed by the other contractors for the same common object. Perhaps it would be more philosophical, and lead to a more reasonable result, if the law were to say broadly, as Mr. Mackenzie contends, that, whether employed by the same master or by several, workmen should be held to take on themselves all the risks incident to such a common employment as the building of a house, or the working of a mine; in short, that the rule *qui facit per alius facit per se* should be limited by a general rule of law, and not merely by an artificial construction of the contract of service. The judges themselves who have laid down the law as I have stated, are not entirely satisfied with the principle on which it rests; and I think this is a case which shows the inconsistencies to which that principle leads; for the implied condition, in the contract between the pursuer and his employer, hardly seems to be a sufficient reason why that employer should not have been liable if one of his bricklayers using this ladder had left it unsecured, while the defr. Darrie, the slater, engaged in producing the same article, a school-house, is held liable because his workmen left the ladder unsecured.

"Be that as it may, the law is now fixed so that only the House of Lords, or the Legislature, can amend it so as to accord with the views urged by the defr.

"I do not think the injury done to the pursuer was a very serious one, at least he has not brought medical evidence to show the extent of it, but, assuming that he was absent from his work for six or eight days, and allowing a small sum additional for solatium for the injury he received, I think I may fairly

allow him damages to the amount of £3, 10s., with expenses, against the defr. Darrie. The defr. Haddon will be assolizied.

Act.—

—Alt.—*Mackenzie.*

## SHERIFF SMALL DEBT COURT OF LANARKSHIRE, GLASGOW.

Sheriff GUTHRIE.

*M'LEOD v. ANDERSTON CO-OPERATIVE SOCIETY, LIMITED.—20th April 1875.*

*Industrial and Provident Society—Alteration of Rules—Withdrawal—Transference of Shares.*—The judgment of the S.-S. contains a statement of the whole case :—

“This action is brought against a society registered under the Industrial and Provident Society Acts, for the amount of a share, for a sum of £3 alleged to have been lent to the society, and for dividends and interest effeiring to the share and loan. The pursuer founds his claim on a notice of withdrawal, dated 27th Jan. 1875. The defrs. say, that that notice is not in conformity with the rules, which do not provide for withdrawal, but make the shares transferable, and that they are willing to transfer the pursuer's share to any person wishing to enter the society, in the rotation provided for by the rules. With regard to the alleged loan the defrs. make no very distinct statement. What they say apparently amounts to this, that the pursuer has credit in their books, which are produced, for the £3 claimed as a loan, but that he has no bond or voucher for it, and that it has been dealt with under the new rules as share capital. With regard to the loan therefore, seeing that the entry in the books is the usual and only voucher in such transactions, and the bonds required by the rules have not been used in practice, and seeing also that the defrs. have produced no authority to treat it as share capital or proof that it has been so dealt with, either in the form of a minute of the Society, or of entries in books, or otherwise, the Society must be held as confessed, and decree will be pronounced against it for the £3 lent, with interest at 5 per cent. from Feb. 2, 1875, the previous interest having apparently been paid.

“In regard to the pursuer's share in the Society, his reply to the defrs.' plea is, that in Oct. 1873 the rules of the Society were incompetently altered, the shares which were previously not transferable being made transferable, and a rule which enabled members to withdraw being abrogated. This he says was *ultra vires* of the Society, being a fundamental alteration of its constitution, effected by a majority against the will of himself and other members, and is not made any better by the certificate of the Registrar of Friendly Societies, which was obtained in ordinary course. The pur-uer maintains, therefore, that he is entitled to withdraw under the original rules, having given due notice in terms thereof; he refers to the general rules of law as to the powers of companies to alter their constitution, and in particular to the case of *Hutton v. Scarborough Cliff Hotel Co.*, 34 L. J. Ch. 643, as showing that, even under the large powers of alteration conferred by the 50th section of the Companies Act of 1862, the articles of association could not be altered by a special resolution.

“That case, however, when carefully read does not establish the general doctrine contended for; because there was in fact no special resolution, and the decision appears to have rested upon that ground; while the Lord Chancellor's indication of opinion, that the alteration there in question could not be made at all, appears to rest on the special ground that it involved a change of the *memorandum* of association as well as the articles, the memorandum not being capable of alteration except in certain particulars defined by statute, and the 50th section applying only to alterations of the articles made under certain conditions.

“The question, therefore, cannot, I think, be ruled by the case referred to; and no principle or analogy, drawn from the statutory enactments of the Act of

1862, can much avail the pursuer, who has to deal with a Society formed under statutes which differ very materially from that Act in their language and objects.

"There is certainly much weight in his argument founded on the common law principle, that the constitution of a society cannot be altered by a majority of its members, or, indeed, by the consent of any number less than the whole. He argues that the altered rules of Oct. 1873 vitally change the purposes of the society, and in the point here in question entirely alters the relation of the members to the society. Before, on presenting a simple notice of withdrawal, a member was entitled to repayment of his share capital out of the funds of the society within a specified time; while, under the new rules, a member can only transfer his share to another person wishing to join the society, and his application for that purpose must wait till all prior applications are disposed of, the applicant in the meantime remaining a member of the society, perhaps, as in the present case, for a considerable time.

"To sustain this contention, so far at all events as regards the rule in question, would, I believe, utterly subvert the principles upon which the registration of Industrial and Provident Societies has hitherto been conducted. Its result would be to sweep away the existing rules of many hundreds of such societies in England and Scotland, and to send them back to constitutions which were years ago made into waste paper.

"Although the Acts of 1862 and 1867, relating to Co-operative Societies, are not so precise in regard to the alteration of rules as the Friendly Societies Act, after the fashion of which they were partly framed, they clearly confer on every society power to alter its rules under certain safeguards. The schedule, which forms part of the Acts, makes 'the mode of altering rules' one of the 'matters to be provided for by the Rules of Societies established under this Act.' The 7th section of the Act of 1867 points out the method of altering or adding to rules, and provides 'that no alterations of, or additions to the rules . . . shall be valid until they are certified.' It is true that this section does not say that upon being certified the rules shall be binding, but the general provision of the 14th section of the Industrial Societies' Act of 1862 enacts that 'the rules of every society registered under this Act shall bind the society and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto,' &c. It is true that the certificate of the registrar is not conclusive as to the legality of the rules, whether in respect of their substance, or the way in which alterations have been made (*Davie v. Colinton Friendly Society*, 9 Macph. 96). But the statute distinctly empowers societies of this kind to alter their rules, and that without suggesting any restriction as to the class or kind of rules that may so be altered. Is it therefore to be concluded, as the pursuer maintains, that the alteration of rules intended by the statute is to be alteration only of those relating to non-essentials? I cannot think that the Legislature intended to create so fruitful a source of litigation; and to impose upon the inferior courts (in which alone such questions are competent) the decision of a hundred difficult questions as to what are fundamental or radical alterations, and what are alterations in things non-essential. The Act has not been so read hitherto, and I am disposed to think that it was really intended to give the largest power of amending the rules of societies—at least a power large enough to authorize the alteration of the rule in question.

"It was not a necessary result of the alteration that the pursuer should suffer any loss by the change in question, for, if he disapproved of it, it was quite in his power, before the rules were certified, to give notice in proper form of withdrawal under the rules then in force, and get out of the society in a few months. Even if he had sought relief from this court within a reasonable time after the new rules were certified, on sufficient grounds, I do not doubt that he might have obtained it. But in the present case there has been a very considerable delay—a delay of more than a year—and during that time the pursuer has, it appears from the books in process, and is not denied, received payments of two sums of money from the society, in name of dividends and interest.



"I think, therefore, that the pursuer cannot succeed in this part of his claim, mainly because he has not alleged and proved any illegality in the manner in which the new rules were passed, or in the substance of these rules; and I think it is very doubtful whether the delay and the withdrawal of the sums of money referred to would not, unless explained away, bar the pursuer from now setting aside the rules, even if he otherwise could do so. I do not lay stress on the latter point, however, as the facts relating to it are not fully before me.

"Of course the pursuer has still a right to get what he can for his share under the new rules of the Society.

"Decree for £3, with interest from February 2, 1875. No expenses."

## SHERIFF COURT OF RENFREWSHIRE.

Sheriff FRASER.

WATT v. RICHMOND'S EXECUTORS.

*Jurisdiction of Sheriff as against Executors residing in different counties.*—Held (1) that a Sheriff has not jurisdiction to compel an executor to account for the executry estate, merely because as Commissary he granted confirmation to the executor, but (2) that a Sheriff has jurisdiction as against a body of executors if one of them having the funds of the executry estate be resident within his Sherifdom, though the others be resident in other counties, these last being cited in terms of the Act 1 & 2 Vict., c. 119, sec. 24.

*Cautioners called as Defenders.*—The 8th section of the Mercantile Law Amendment Act, which enacts that cautioners shall not be entitled to the benefit of discussion, does not apply to cautioners for an executor in a confirmation.

The circumstances of this case are stated in the following note to the Sheriff's interlocutor:—

"The first plea stated in defence is against the jurisdiction of the Court. In regard to this plea, there is no direct authority in the decisions of the Supreme Court, and therefore the question must be argued out on principle with such light as the authorities afford.

"The deceased George Raddan Hastings Richmond died domiciled in the Upper Ward of the County of Renfrew, and confirmation was granted by the Commissary of Renfrew to the deefs. Mrs. Derby and Mrs. Barr. The other deefs. M'Leod Barr, William Wylie, and John Richmond, were cautioners in the confirmation, and the account sued for is for board and lodgings, and for goods delivered and funeral disbursements.

"The domicile of the deef. Mrs. Barr is in the County of Renfrew, but in the Lower Ward thereof. The domicile of Mrs. Derby is in the County of Ayr. The domicile of the cautioners, Robert Barr and M'Leod Barr, is in the County of Renfrew, but in the Lower Ward; and the domicile of the other cautioner William Wylie is in the County of Lanark.

"Thus at least one of the executors is within the jurisdiction of the Sheriff of Renfrew, and so are two of the cautioners. It is not a case, therefore, where the jurisdiction is said to rest simply upon the fact that confirmation was granted by the Commissary of Renfrewshire, all the executors and all the cautioners being outwith that county. Besides, the fact that one of the executors is resident in the County of Renfrew, there is also this additional fact that that executor is in possession of the whole funds yet undistributed. If all the executors and all the cautioners and all the funds were outwith Renfrewshire, the Sheriff cannot see upon what ground he could sustain his jurisdiction. There is authority for the doctrine that an executor who has obtained confirmation in Scotland, but who is resident in England, may be sued before the Court of Session, with reference to the executry funds, provided jurisdiction has been constituted against him by arrestment *jurisdictionis fundanda causa*. See

*M'Morran v. Cowie*, 16th January 1845, 7 D., p. 270, and *per* Lord Chancellor Loughborough in *Ferguson v. Douglas Heron & Co.*, 3 Paton's appeals, p. 510. But the doctrine has never been carried further so as to give a Sheriff jurisdiction, merely because as Commissary he granted confirmation in a case where the persons of the executors and the estate are out of his county. It is true that there is a clause in the bond of caution in the confirmation in the following terms :—' And both parties (that is the executors and the cautioners) subject themselves, their heirs and successors, to the jurisdiction of the Commissary of the Commissariat of Renfrew in this particular, and appoint his clerk's office in Paisley as a domicile whereat they may be cited to all diets of Court, at the instance of all and sundry having interest in the defunct's effects, holding any citation legally affixed and left for them upon the wall of the said office as sufficient, as if they were regularly summoned.' This is a clause that has been inserted in such bonds of caution for a long period of time. It is contained in the oldest books of styles, but it seems now to be entirely without practical effect. In the first place, the present is not an action before the Commissary of Renfrew, but before the Sheriff, and in the next place, no action like the present to account for the executry estate would now be competent before the Commissary, because the Act 4th Geo. IV., cap. 97, sec. 7, enacts ' That, from and after the said first day of January 1824, the jurisdiction now exercised by the Commissaries of Edinburgh, in actions for the recovery of debts, not exceeding £40 Scots, and all prorogation of their jurisdiction in any action for the recovery of debt, shall be, and the same is hereby declared to be, from thenceforth abolished and prohibited; and no inferior Commissary, as established by this Act, shall possess or exercise any jurisdiction in such actions, or in any cases to which the jurisdiction of the Sheriff is now competent.' In the case of *Black v. Duncan*, 18th December 1827, 6 Shaw, p. 261, it was held that ' trustees of a party deceased, who was proprietor of an heritable property in which he had carried on a manufacture, may be sued before the Sheriff of the County where the deceased had lived, where the property lay, and where the managing trustee resided, although the majority of their number personally dwelt in another County, they being cited by letters of supplement.' There is a specialty in this case cited, in respect that the trustees still continued to carry on the business of the deceased party in the place where he had his domicile, but still it is an authority for the proposition that, if one of a body of trustees or executors is within the jurisdiction of the Sheriff Court, and has possession of the funds, the others may be made subject to the jurisdiction in being cited by letters of supplement. Letters of supplement have now been superseded by the simpler mode of citation introduced by the Act 1 and 2 Vict., cap. 119, sec. 24, and this form of citation has been adopted in the present case with reference to the defra., who were resident in the Counties of Ayr and of Lanark.

" Again, in the case of the magistrates of *Wick v. Forbes*, 11th December 1849, 12 D., p. 299, the Court of Session sustained an action against five parties who had jointly confirmed as executors of a party deceased whose funds were in Scotland, although two of the executors resided abroad, and no steps had been taken to found jurisdiction against them. The ground of this judgment seems to have been, that the executors were a company, and the majority of them were resident in Scotland. ' They can form a company of executors,' said Lord Mackenzie; ' they are strictly united together, they are all bound to account in Scotland, and to the Courts of Scotland, and the majority of them are resident in this country.' It does not seem very clear why the fact that a majority were resident in Scotland should have any effect in a question of jurisdiction. But, so far as there is authority, it goes to this, that a Sheriff has jurisdiction over a body of executors if one of them having the funds is resident within his jurisdiction.

" The second plea is, that the action against the cautioners is premature, because the debt should be constituted against the executors, and they ought in the first place to be discussed. The Sheriff is of opinion that the 8th section of the Mercantile Law Amendment Act does not apply to a cautionary obligation

like the present, and that the cautioners are entitled to the benefit of discussion. But then it does not follow that the action should be dismissed. The cautioners are entitled to have the action sisted *quoad* them, but that is all (*Macdonald v. Rankine*, 7th July 1829, 7 Shaw 845). This, however, would seem to be a very doubtful benefit. They are entitled to insist that the debt shall be constituted against the executors before they can be called upon to pay (*Anderson v. Borthwick*, 5 Shaw 879), but if a decree of constitution has been obtained against the executors, the cautioners, though entitled to try over again the same questions, can only do so by way of *reduction* of the decree, and then only upon an allegation that the executor has omitted a competent defence. The propriety and expediency of calling the cautioners along with the executors in order to overlook the proceedings is quite manifest. 'Whenever,' said Lord Medwyn, 'a creditor wishes not to be called a second time by the cautioner to establish his debt, he ought to bring him into the process. He has his right of relief against him, and is entitled to call upon him to overlook the process. If he does not appear, this is his fault, and the creditor in this case would not be bound to enter a second time into the investigation. If, however, the cautioner is not called, and everything is done behind his back, he is entitled to see that everything has been done regularly, and that there is a valid decree against him' (*Ross v. Mackenzie*, 25th June 1840, F. C.).

"In another case the Court went further (*Mackenzie v. Mackenzie*, 24th June 1842, 15 Jurist, p. 34), and held that there was no necessity for calling the cautioner at all, and that the decree against the executors would be binding as against the cautioner. 'There was no authority' (said the Lord Justice Clerk) 'for compelling the party to call the cautioner, and this was a consideration of importance in considering the second point. The person who filled the office of executor was the proper party to call when the demand was against the executry funds, and when decree was obtained against him the title was complete. As to this, or any such claim as the party here made against the executor, the law could not look at his cautioner as a necessary party. If the cautioner was afraid of consequences it was for him to watch the rolls of Court to observe what was done, and to provide accordingly.'

"The practical result is this, that the cautioners are entitled, if they so wish it, to have the process sisted *quoad* them, but it is for them to consider whether it would not be for their own interest to remain in the process, and see that all proper defences are stated.

"As the executor resident in the County of Renfrew is in the Lower Ward, and as are also the cautioners Robert Barr and M'Leod Barr, it might perhaps be proper to remit this case to the Sheriff Court of the Lower Ward, although confirmation was obtained in the Sheriff Court of Paisley, but, as this question does not arise under the appeal, the Sheriff has not dealt with it."

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# THE JOURNAL OF JURISPRUDENCE.

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## SCOTTISH LAW UNDER CROMWELL.

THE final triumph of Cromwell, when he routed and dispersed the sanctified and Covenant-loving army at Dunbar, must have filled with dismay many a Scotchman who looked with indifference upon the cause of the Stuarts. A people who at no distant date had viewed with alarm the removal of their king to England, and who had successfully resisted the attempt which he had made to bring about a farther union between the two kingdoms, were now called upon, in their utter helplessness, to witness the sudden obliteration of all the marked features of their own nationality carried out in conformity with the decided policy of the English usurper. Charles and his malignants were bad, but in getting rid of them, had they indeed improved their condition? The Protector's finger was thicker than the king's loins, and they who had suffered from the whips were now experiencing a chastisement with scorpions.

For Charles, unsatisfactory and unsound as he was, had respected their national institutions—had supported the Estates—had not touched the Court of Session—had shown outward respect at all events to the General Assembly. But under Cromwell all old things were evidently to pass away. Had the changes which he was introducing, by his ordinances, orders and proclamations, been confined to England, they would have excited little or no interest amongst the great mass of the Scotch. What to them was the House of Lords? The Church of England was a mass of corruption—the whole nation alien—the hotbed of Quakers, Brownists, and prelatists. But he laid his impious hands upon Scotland—he declared the unity of the Commonwealth—he fixed the seal of the legislature for both kingdoms in the far-distant London—he substituted for the Session an odious and hybrid court of his own creation—above all, he silenced and dispersed the General Assembly. All these successive blows struck at their nationality were the unfortunate people called upon to witness in mute despair.

The character of the men who did such things must have added to the mystery of the dispensation. They were not malignants, yet they were not Covenanters. They hated priests and prelates, but they respected neither presbyteries nor assemblies. They knew and professed the Scriptures, and yet they were ready to disperse ministers as if they were rioters, and set the discipline of kirk-sessions at defiance. From whence came they, and whose servants were they? The mission of such men as Huntly and Montrose was clearly from below, but these preaching soldiers and statesmen—what enigmas did their characters present to the minds of our ancestors!

We propose in this article to direct the attention of our readers to the legal affairs of Scotland under Cromwell, of which perhaps too little has been made by historians and others. The chief interest attaching to the period of the Protectorate appears to us to be this—that at that time, in a rough and ready manner it is true, but ably and decidedly, were reforms and changes for a time brought about, some of which have since become established, while to others we look forward either with satisfaction or the reverse, as likely to take place in the future. It was clearly the policy of Cromwell to change the institutions of the country as much as possible, because the existing state of things was closely connected with banished royalty, and all that cherished loyal feelings must be discouraged. As he had a triumphant army at his back, he needed not to persuade or bribe the people into an acceptance of his reforms. Observe the difference between the Union as brought about by him and that in the reign of Anne. A mere bold stroke completed the first—it was accomplished by a proclamation and a flourish of trumpets. But with what difficulty was the latter and more permanent change brought about—how long were the controversies—what persuasion, what wheedling, what bribery preceded it! The same principle of ready and prompt action, of thoroughgoing reform, characterized the legal changes introduced by Cromwell.

The sources of information relating to our subject are not so numerous as might have been expected. People seem to have been ashamed of this particular period of history. "During the usurpation of Cromwell," says Laing the historian, "the history of Scotland is almost entirely mute. The writers seem to avert their eyes from a period of ignominious yet not intolerable servitude." A servile bench and bar hastened at the Restoration to bring back everything to its former condition, and in the intoxication of loyalty doubtless looked upon the Protectorate as upon a hideous dream, and shrank from all the evidences of its having been a reality. Not until 1762 was the MS. report of the cases decided during this period taken from its obscurity in the recesses of the Advocates' Library, and given to the public in the shape of a modest folio. Its decisions are of course of no authority, and their very existence is almost forgotten by most practising lawyers;

written in the abridged and obscure style of the day, they certainly present few attractions to the student.

Cromwell was not long in taking measures to establish his rule in the northern part of the kingdom, nor in securing the administration of justice. Scotland was to be dealt with as "reduced unto and brought under" his government, to quote the words of one of his ordinances. On the 15th of January 1652 his Commissioners, including Monk, Lambert and Vane, made their appearance at Dalkeith House. Their proclamation was a few days afterwards given forth at the Cross of Edinburgh, with more pomp and ceremony than one could have expected from the representatives of a sober republic. The Cross was hung with rich tapestry, and eight trumpeters performed upon silver instruments. The Commissioners set forth their authority from Parliament for securing an equal and impartial administration of justice to the people of Scotland; and their intention to speedily erect "judicatories, and to appoint persones to the administration of justice." They then went on to declare that no power, jurisdiction, or authority, derived from the pretended King of Scotland should be used within that kingdom. In May of the same year the names of the new judges were announced in a similar manner. The commissioners for Scotch affairs seem to have been all Englishmen. The Scotch, however, were to be represented upon their own bench. Little weight as the Scotch feelings and prejudices had with the all-powerful Protector, even he must have been aware how difficult Englishmen would find it to administer a foreign system of law and to listen to pleadings in a strange dialect. Doubtless they were intended to cut and carve upon Scotch law, and supersede it to a great extent, according to their own notions of equity. But still some acquaintance with what had been already, and in the dark ages now past away, administered under the name of justice was desirable. But the judges were not to be all Scotch. This would not have served his purpose. Scotland would not have felt sufficiently reduced or crushed under such an arrangement. There were to be English judges, and these judges were to form the majority, so as to secure proper decisions in the event of any division of opinion. It would rather appear from a State paper in the Thurloe collection, that not only did the English judges form the majority, but that they received double the salary of their Scotch brethren. If true, it is certainly a blot upon the otherwise reasonable administration of Cromwell. The number of the judges was considerably reduced, and fixed at seven. The Englishmen were Mosley, March, Owen, and Smith. Concerning Mosley we can discover nothing, March did not long occupy his position, for in 1653 Nicoll, in his Diary, notes that "Judge March being removed from his place as a judge, pleadit to be resavit ane of the ordiner advocattis, quhilk wes grantit." Owen was removed at the same time, and disappeared. Smith died upon circuit at Inverness in

1653. The Scotchmen were three in number, viz., Hope of Craig-hall, Sir William Lockhart, and Swinton of Swinton. Hope (eldest son of the celebrated Sir Thomas) was the only one (then appointed) who had already acted as judge. He had been appointed Lord Ordinary so far back as 1632, had distinguished himself on the popular side as against the King, and for the Kirk, he had the recommendation of having given offence to King Charles during that monarch's temporary and troubled rule in Scotland, and accordingly, with his experience, was not unsuited for Cromwell's purpose. Naturally, he appears to have had great influence with his six brethren, and to have acted as their virtual president, although in name that office was abolished. He was elected one of the members of Cromwell's Parliament in 1653, but died in the following year. Of these men, that interesting old writer, Forbes, in the preface to his *Journal*, says: "The new judges (as all men ignorant of, or not concerned for, the laws of their country are) were filled with new schemes and rules for despatch and administration of justice." Nicoll relates how they sat down in judgment in the Parliament House guarded by soldiers against the assaults of malignants; how the magistrates in their scarlet robes appeared before them and took the new oaths, and how his own learned body (the Writers to the Signet) were also called for and directed to make the necessary changes in legal writs. The King was to give place to the keeper of the liberties. "Sum," he tells us, "of that number were present, uthers were absent, and sum refused to engage."

An unpopular reform dealing with the members of the College of Justice was also, according to Forbes, brought about. It is well known that those who could claim that distinction were until lately exempt from sundry municipal and other burdens. But he tells us that during Cromwell's usurpation they were robbed of the dear privileges they had enjoyed from the institution of the College of Justice, and subjected to the unlawful exactions of the time.

Of course, as was to be expected, many refused to plead before this new and unlawful tribunal. The oaths calling upon them to be "true and faithful to the Commonwealth as now established without a King," kept back Covenanter and cavalier alike. Some who returned to practise afterwards hesitated at first. It is said, however, that the more eminent of them discovered a way of drawing fees without compromising their loyalty. Forbes—who, as we have seen, looked back with no favour upon "the new judges,"—says, "Finding that they, being strangers to our laws and customs, could move the wheels of justice but heavily, they introduced the management of debates in writing, that they might have the more time to deliberate on their decisions, and indirectly have the assistance of the great lawyers; which written debates were drawn by the non-conforming lawyers, and presented by men of less note at the bar." This is a capital story for the (probably Jacobite)

lawyer of the reign of Anne to tell—throwing as it does contempt upon the rebel occupants of the bench, and confining all the learning and wisdom to the friends of the banished King. How much truth there is in it may be now difficult to say. Written pleadings were not unknown before that date, but the inexperience of the judges may have called forth more elaborate papers, while we have little doubt that the tender conscience which debarred a man from pleading did not prevent him from using his pen in preparing arguments for others. The earliest cases in the collection of reported decisions, however (of date 1655), bear as counsel the names of such men as Gilmour and Stair. Written pleadings, however introduced, obtained singular favour with Scotch lawyers, and have called forth the learning and ingenuity of successive generations. The Outer House was at first abolished, but afterwards restored. Upon the forms of process no great change seems to have been made, if we are to judge from the directions given to the Writers to the Signet. Even the “new judges” do not seem to have thought it necessary to substitute petitions for summonses, or indulge in any of the other little novelties which in our day form striking features in Court of Session or Sheriff Court Bills. They contented themselves with expurgating all references in the Styles to departed royalty. The influence of the Scotch minority would keep them right in this respect. Conveyancers are, however, aware that English took the place of Latin as the language of charters; one of the reasonable reforms of modern days then anticipated. The judges, however, as their predecessors had done, made regulations for the conduct of business, and to insure the purity of justice. We all know the reputation for impartial and honest judgments which they obtained. One branch of law, viz., conveyancing, which at that time was by far the most important, was naturally affected by the Protector’s legislation.

It was impossible that Cromwell could leave in peace the feudal system of Scotland. Not only was it associated with everything which he came to destroy, but there was a practical danger arising from its preservation. It secured the semi-bondage of the lower and middle to the higher class or landed interest, and the latter was of course the least friendly to Cromwell. A more conservative government than that of the Commonwealth, after the rebellions of the 18th century had proved how dangerous to settled rule was the system of hereditary jurisdictions, did not hesitate to sweep them away. But George II. had this example set before him by Cromwell, and it would have been well for Scotland had the Restoration not undone in this respect the work of the Protectorate. From the nature of the reform which he carried through by his ordinance of date April 12, 1654, it is obvious that his object was to break down the great power given to the landed aristocracy of the day. Thus his enactment is “to the end that all dominion of tenures and superiorities importing servitude and vassallage may likewise be



abolished in Scotland." It provides that no vassal shall be bound to make any payment to the superior, with the exception of the "reasonable fines," i.e. casualties upon the deaths of lord or vassal. Further, that where the "fine" is uncertain or untaxed, it should in no case exceed one year's value of the lands. There was also exempted the curious feudal right to "heriot," or the best animal of the vassal, which became the property of the lord on his decease. This last exception is an indication of the quarter from which the ordinance came, for the "heriot" was more familiar to the English than to the Scottish lawyer. And all the other claims real or pretended of superiors were abolished. But the most important part of the ordinance is that which discharges the obligation of the vassals to appear in the various courts of the superiors—all of which, along with heritable offices, were at once abolished. The conditions imposed upon vassals thus rendered illegal were to be omitted from all future deeds. Thus, in a characteristic manner, did Cromwell take the sting out of the feudal system of Scotland, and give to the vassals a freedom which they had never enjoyed before. It was a necessary step before establishing anything like a complete system of legal administration throughout the country.

Probably the practical effect of this important ordinance of Cromwell was not great. It was passed only four years before his death (at which date, it may be said, the administration of justice was almost suspended), and there was hardly time for so great and sweeping a change to take effect over the country.

Having abolished the feudal courts which had administered local justice, he was obliged to find substitutes. He seems to have favoured in the inferior courts a system similar to that adopted in Edinburgh, and probably rewarded his military followers with local judgeships. One historian tells us of "English officers who administered a summary yet not unsubstantial justice according to the plain dictates of an unlettered understanding." Lamont, in his Diary, mentions an order of the Protector's for the erection of Courts Baron, to be holden every three weeks, and which seem to have come in place of those abolished, as already stated, having jurisdiction "of all contracts, debts, promises and trespasses, whatsoever arising within their precincts and bounds."

Cromwell's instructions for the Justices of Peace in Scotland were issued in 1655. The office itself was introduced into Scotland by James VI., and it has been remarked that the life and efficacy with which Oliver Cromwell inspired it must have been more from the awe, reputation, and vigour of his government, than from any advantage or superiority in his regulations, which little differed from King James's.

With the great and mysterious subject of teinds Cromwell does not seem to have meddled. He evinced little respect for the Kirk of Scotland, and none for the Assembly, but he secured to the ministers their means of subsistence. Accordingly, commissions

were appointed, teinds valued, and stipends modified as formerly. By his ordinance of 1654, passed for the better support of the Universities of Scotland, Cromwell transferred the superiorities of the lands and teinds of the Bishopric of Galloway to the University of Glasgow, and those of Aberdeen to the colleges of that county.

To fill up vacancies, caused by deaths and resignations, in the Supreme Court there were during the Protectorate no less than fifteen appointments made. In nearly every case a Scotchman was appointed. Probably greater trust had come to be reposed in the people of the country, who had settled down with remarkable quietness under the rule of Cromwell. Of these fifteen four had been formerly Lords of Session, viz., Pearson, Learmonth, Johnstone and Brodie. The appointment of Pearson had been made in 1649. He seems to have acted as counsel for Lord Balmerino in 1634, and also to have held the post of legal adviser to the Scottish Parliament. Learmonth of Balcomie had been raised to the Bench so far back as 1627. He took an eminent part in various public undertakings, and had acted as President of the Court; but his Covenanting politics had led to his dismissal from office in 1649. It is surprising that a man of his reputation and experience should not have been one of the original members of Cromwell's commission. He died in 1657, suddenly, while upon the bench, "to the great grief of much people," as Nicoll tells us, and "his removal fra that bench was esteemed to be a national judgment."

Johnstone of Warriston was one of the most remarkable Scotchmen of his day. He was, through his mother, a grandson of the famous Sir Thomas Craig, and was called to the Bar in 1633. As a public man he espoused the cause of the Church, and opposed the introduction of liturgies and other novelties. He received however honours from both parties. The General Assembly made him their Procurator, and the King (when it became necessary to conciliate the Church) made him a judge. He was afterwards appointed Lord Advocate, a post which he held along with his seat upon the Bench. He was a member of the Assembly of Divines, and he directed the military operations of Leslie at Dunbar. But from Cromwell, in spite of this last act, he received honours. He was not only one of his judges, but he sat in his House of Lords as a Peer.

He had of course rendered himself too notorious to be passed quietly over at the Restoration. Outlawed, and with a reward offered for his apprehension, he fled abroad. His retreat was discovered, and after imprisonment in the Tower, he was brought before the Scotch Parliament to be dealt with as an outlaw. No mercy could be expected from such a quarter. He was executed at the Cross of Edinburgh in July 1663. "My Lord Warriston," says Wodrow, "was a man of great learning and eloquence, of very much wisdom, and extraordinary zeal for the public cause of religion and reformation, in which he was a chief actor; but, above

all, he was extraordinary in piety and devotion, as to which he had scarce any equal in the age he lived in." The same writer vindicates him from the charge of treason, and speaks of him as having been prevailed upon through importunity to fall in with the usurper.

Brodie of Brodie was what may be called a representative Scotchman of the period—as a private man, very pious, given much to meditation and self-examination; in politics, opposed alike to King and Protector, clinging to that fond idea never to be realized—of a Covenant-loving and keeping King and a triumphant Church. He had taken his seat on the bench in the last year of Charles's reign, and upon the establishment of the republic retired to the country. He so disliked the new rule, that he tells us he had resolved, "in the strength of the Lord, to eschew and avoid employment under Cromwell;" nor did he indeed ever accept it, as he did not return to his judicial work until the end of 1658, after the death of Oliver. Nicoll tells us that he was admitted a judge "eftir a long call and invitatioun made be the judges of the Court of Sessioun, and of the laweiris, clerkis and wryteris, by the space of many weekis befor."

Of Stair, who was appointed by Cromwell in 1657, and who alone of all his judges was retained after the Restoration, it is perhaps hardly necessary to say anything here. He had practised at the bar under Cromwell's administration until the Tender was imposed, and returned again after that difficulty was got over. He formed one of a small committee appointed by the Faculty for the purpose of getting the Outer House restored to them, and by whose efforts that institution was again established. He was recommended to Cromwell by Monk as "a very honest man, a good lawyer, and one of considerable estate." Not without scruples, however, did he accept the office. A judicious visit paid by him to Whitehall upon the return of the King secured his seat on the bench of the restored Court of Session.

In the year of the Restoration—when the people were calling out for the King, and fear and perplexity had fallen upon the Government of the unfortunate Richard—a last commission for the appointment of Scotch judges was issued. For some time past judicial work in Scotland had been suspended. This commission never took effect, because, according to Nicoll, no one knew in whose authority and name to direct the warrants or letters—whether in that of the Protector, whose day was just over, or in that of the King, whose day had hardly come. In the meantime the Restoration was accomplished. An entirely new commission was issued. In all the glory of the former number did the judges of the Court of Session again sit. Everything done under the usurpation was declared null and void; Cromwell's innovations were looked back upon with horror, and his judges characterized as "kinless loons,"

W. G. S. M.

THE CRIMINAL PRACTICE OF SAXONY.<sup>1</sup>

(FROM THE AMERICAN LAW REVIEW.)

THE jurisprudence and practice of Saxony are reputed to be the most scientific and complete in the German States; with lawyers, however, rather than laymen, who have been heard to complain of its costs and delays. All proceedings were formerly carried on in writing and in private; but in the year 1856 the criminal courts were opened to the public, and the examination of witnesses made oral, and in 1868 the institution of the jury was introduced in criminal cases. In civil cases none of these changes have been made. As will be seen, its introduction is far from transforming the courts where it is in use after our own model. It has been referred to in the debates of the German Legislature as productive of immense benefit; on the other hand, of the two innovations, publicity and oral examinations are rated much the highest by members of the profession. Probably the difference is between the political and professional view.

Saxony is a small country of itself; but the changes and present condition of its laws represent faithfully enough the gradual democratization which is going on in Europe, and already extending into Russia and down the course of the Danube, is slowly but constantly bringing new regions, languages and nations within the reach of western civilization.

Among the first things which the Germans thought it necessary to do, in order to be one people, was to have the same laws. The criminal code was first enacted and went into operation throughout the empire in 1871. The preparation of the general civil code has presented more difficulties; and, although an immense amount of work has been expended on it, it is not yet, but is soon expected to be, enacted. Saxony alone of the German States possesses a civil code of law, which was independently adopted in 1863-1865, before her absorption into the empire.

A little book which can be had for twenty-five cents contains the whole criminal law of Germany. It is expressed, and, when necessary, definitions are made in plain, intelligible language, and conveniently arranged. The proceedings, even in newspaper reports, refer to the chapter and paragraph under which they are instituted. It is not to be supposed that the technical phrases convey the same meaning to all minds, or make the peasant comprehend the laws under which he lives as well as a judge. But it is a great deal nearer to it than where the law has to be hunted out of the whole

<sup>1</sup> The following article is the result of some months' attendance, off and on, upon the criminal courts of Dresden, Saxony, partly to observe the proceedings and partly to learn the language. The writer's attention was directed not so much towards a scientific appreciation of the law as to the practice, with the view of noting such fruits as might be of value in our own practice, or furnish valuable suggestions.

statute-book and a thousand volumes of reports. The general intelligibility and expedition of the proceedings, where reference is made to the state of the law, are in strong contrast to the frequent cumbrousness of our own, and let a stronger light into these sacred mysteries.

Offences are submitted, according to magnitude, to, 1st, the police,—public not admitted; 2d, to a court, without jury, of seven members, three of whom are lawyers, with permanent appointments, and four laymen, who serve for one year, and are appointed by the presiding judge of the court above; 3d, to a court of three members, sitting with a jury. Cases of much importance come before this court. In the country small offences are brought before a single judge.

Provision is made for appeals in law questions to the highest court of cassation, but not for trial by jury in all cases. The right is freely exercised, as it ought to be in cases of scandalous or immoral character, of excluding the general public. The prosecution is represented rather than conducted by a state's-attorney, usually in the course of promotion to a judgeship. Counsel is allowed the defendant, and is even assigned and paid for; but, as the defendant is confined in the dock, there is little opportunity for conference during the trial.

Witnesses are sworn with great formality; the oath being recited by the judge, and repeated clause by clause by each witness. The prosecutions for perjury are, notwithstanding, out of all proportion more numerous than with us; proceeding, however, it is fair to say, mostly from money questions in civil cases. Witnesses are kept apart until called in to give evidence. The testimony is taken down and read out by the clerk, and these notes are officially part of the case.

The jury of twelve are drawn out of a summoned panel of thirty-six, of whom twenty-four must be present. The jury list is the whole body of tax-paying citizens, less the somewhat numerous but legally determined exceptions, and is prepared by the district judge with the help of municipal officials, and also exhibited for public examination.

The trial jury is made up out of the panel, and the government and defendant have an equal right of challenge out of the surplus over twelve; for instance, if thirty answer to their names, each would have nine challenges. A juror may be rejected for cause,—relationship or manifest interest; but there is no examination into opinions nor provision for further summons after the panel is exhausted. In long trials it is the practice to seat, say, two by-jurors, who assist in making up the verdict, in case any of the twelve become unable to do so. The juries are respectable and trustworthy in appearance, evidently drawn from the upper and middle classes. The name, rank, residence, and business of each are carefully read out. In general, their duties are well and carefully performed, with perhaps a leaning towards mercy.

The court being thus constituted, the accusation piece is read. This must include a statement of the offence in the language of the statute; but it is a very different thing from an indictment, and represents at the outset a different idea of criminal procedure. The prosecution is an act of authority and of responsible official duty; it is therefore made by law to depend upon an examination of the whole case upon both sides. It presents the government theory of the case in ordinary language and including any facts in the life of the accused which may be thought to explain his acts. Besides the statement of the matter to be tried, it includes many others, and is thus the occasion of a still wider deviation, in the next step, from that common-law practice which is the symbol at least of principles which centuries have instilled into the blood and brain of English-speaking people, so as to constitute their idea of the only social and political relations which they recognise as just: *the defendant does not plead*. The plea is no doubt, in nine cases out of ten, a favour of which the prisoner at the bar does not know the meaning, or derive any great satisfaction from; and yet its absence seems to call up at once the conception of a different government and society.

Not even the apparent consent or adherence of the accused is asked to the proceedings of which he is the object; a pleasing antiquated fiction that he puts himself upon the country, "which country you are," embraces him. From the moment he stands charged with crime, he is visibly cut off from the social organisation, with no relation but that of force left between them. The trial thus proceeds without any issue in the common-law sense being made up, and commonly at first with the examination of the defendant. He is not sworn, but is cautioned to tell the truth, and may be compelled to answer questions. The examination is conducted by the presiding judge from notes of preliminary examinations; and however courteously and fairly, and, in fact, because in the interest of public justice it is fairly conducted, it is apt in its progress to present the spectacle of the unequal struggle of an ignorant and untrained mind against one sharpened by habits of investigation, and so unavoidably comes into conflict, not only with what we are in the habit of seeing, but also with those ideas of impartiality which we attach to the judicial office, when its rigorous observance is the last refuge of the unfortunate. The active part here taken by the bench looks too much, in our eyes, as if that very justice, which sits to hold the balance, were taking sides against the weaker party, which is thus attacked in the only quarter where it can look for protection.

The appearance of the defendant on the stand is no longer a novelty with us. As he is not here sworn, and does not testify under the penalties of perjury, his position is easier. The right of compulsory examination does not therefore seem to carry with it the right of obliging him to tell the truth and to criminate himself.

In principle it only claims the right of ascertaining what colour can be put on inculpatory circumstances. There is, however, a branch of inquiry which both in law, in the words of the statute, and in practice, is pursued further than with us,—the question of intention. This question the common law settles at the outset in the manner most unfavourable for the defendant, in the principle that he shall be held to intend the consequences of his acts. With his appearance as a witness it has become the subject of direct inquiry to himself alone; but the field thus opened has not obtained much recognition in the law. But intent having been here from time immemorial matter of investigation, it plays a larger part in legislation, and is more specifically inquired into, and distinctly submitted to the jury. Subdivision of offences on this ground is carried farther than in common-law countries, and it also probably furnishes the occasion for the “mitigating circumstances,” which appear so frequently, and to us so incomprehensibly in foreign verdicts. The examination of witnesses is likewise by the court. As they are, in its opinion, exhausted, counsel on either side put questions as they think proper, but not so as to take the lead in the examination. In fact, they take on the same air of deference as may be seen with intelligent counsel in our own courts, where judge or jurymen puts in a question. Witnesses for the defence belong also to the case in a sense unknown to our procedure, and are paid by the government under conditions. The order of the testimony is arranged, the witnesses called, and the case put in, as we say, by the court.

In such an examination there is no question about the admissibility of evidence. When the court asks a question, it has decided that it is a proper one to ask. But there appears to be in no quarter any thought of those limitations which give us so much trouble. Anything in the way of evidence that to the natural mind seems to be connected with the case is put in without objection; and, although it goes here and there beyond what is allowed by our rules, it takes less rather than more time. But then the judge is likely to be a person of superior intelligence and capacity for business, without any interest in prolonging it. In the hands of opposing counsel the case might readily be very different.

When the evidence is in, the issue is made up by giving to the jury one or more questions, following the words of the section or sections under which the defendant is complained of, and the complaint. They are prepared by the court, with the help of such suggestions as may be made by counsel. The law question, if there is one, may be carried up. They are accompanied by such definitions of the statute and of the offence as appear proper, but without any formal charge, and especially without expression of opinion on the part of the court.

The questions will read, for instance, as follows:—Is the defendant guilty of murder, in that, at such a time and place, with the purpose of causing his death, and with malice aforethought, he

struck A. with a knife, of which blow A. died? Is the defendant guilty of manslaughter, in that he struck A. so that he died? Is the defendant guilty of assault with intent, &c., in that, &c.?

The arguments of counsel are addressed to the points thus presented. It is possible that the definiteness with which they are made may have a corresponding influence on the deliberations of the jury; it certainly seems to have on the efforts of counsel, which are very far from reaching the heights of oratory sometimes attained in our criminal courts.

The answer of the jury to the questions submitted is "Yes," or "No," by more than seven votes. Unanimity is not required, and as it generally happens that the majority of a jury are of one way of thinking on the first ballot, it is to be presumed that the authors of this system were of the opinion of Talleyrand, that first impressions are honest.

Sentences are in general, I should say, lighter than with us; mostly to hard labour, with loss of civil rights for a longer or shorter period. This entails supervision by the police. Capital punishment is practically abolished, though still on the statute-book for murder and high treason.

There are few things in this procedure which lawyers of the common-law school would often care to adopt. The two systems are so radically distinct, they start from such different principles, and in the course of time have been thought out so consistently to the last detail, that, in its proper place, every part possesses a value which would be wanting anywhere else. But of the two this one has been in operation longest, over a far greater variety of people in different stages of cultivation, to all of which it has proved its adaptation. Even if there is nothing to adopt, it does not prove that all the advantages are on our side. A comparison of the two, showing how similar results are obtained in different ways, and a gain in one direction makes up for a loss in another, ought to expand one's legal horizon and help towards a really better comprehension of both. The extension of the power and functions of the court brings with it a corresponding diminution of those of counsel, whose character and office is by no means the least important part of judicial procedure. The inferior opportunity to shine in the public view has its effect on the position of the whole legal profession, makes of it a soberer and more retired pursuit, on the level with other callings, and no more than they the stepping-stone of ambition. The conduct of the case throws it less into the power of counsel to serve their clients, and also far less to serve themselves. That promptness and adroitness which are only attained by long practice in public, the knowledge of human nature, both in its ordinary and intricate workings, which is not to be learned from books, and least of all from law-books, but which is the best part of his professional acquirements, for a lawyer practising in a common-law court have less field for their exercise, and are less regarded



and developed. The profession is a studious one, learned out of and pursued according to the books. No bullying of witnesses, no tyrannizing over the court, and above all no cross-examination.

Cross-examination is undoubtedly the most tremendous instrument ever invented for extracting the truth in difficult cases; it suits our independent and combative disposition so well, and has been so long in use, that nothing else could take its place. But the fact that it has not extended more widely indicates an artificial side. In hearing an examination as here conducted, it appeared to me that the jury got as fair an idea of the course of events as in our own courts. It was against all our rules, with abundant use of leading questions and expression of opinion; but it finished up every branch of the subject as it went along, so as to leave a distinct and complete impression.

There is no question but that the public interest is sufficiently protected. But even on the part of the defendant it is not so poorly off as we are apt to suppose, or as it would be with the part assigned to the judge in our own courts. If he cannot, on the one hand, when he knows he has got the right counsel, enjoy the perfect confidence that he is going to be pulled through, "although they found the money in his boots;" on the other hand, he is not such a victim when he has taken the wrong one. As things go, is not this quite as well? It is a perversion of justice, and a blot on its administration, when the issue of a case can be made to depend upon the strength of counsel.

That this is notoriously the fact with us need not be urged. In this procedure the court sits to investigate the whole case; and the defendant may rely with reasonable confidence on the action of a court from which this is expected, and whose reputation is interested in its performance. As a matter of fact, the administration of justice stands in the very highest repute.

A word on the character of crimes. Juvenile offences have increased with the concentration of population in cities, and crimes of violence for a period after the war. Most noticeable is the small proportion of the latter. Even murders and burglaries have a secret and underhand character about them, often connected with adultery or some social derangement. Taken together, they indicate a less vigorous and sturdy life than is led in America. As an example: By the returns of police arrests in Dresden—190,000 inhabitants—for September 1874, the whole number is 1369, among which a great part are for violations of city ordinances and minor offences, which would not come before the higher courts. Of the crimes of violence the figures are as follows: burglary, 23; simple larceny, 261; simple assault and battery, 2; drunkenness, 20; and no others. There were in the same time five suicides.

## LAW AND LETTERS.

THE late Lord Chancellor Campbell wrote a book to prove that Shakespeare was a lawyer. We think he failed to make out his case, and that, on his own showing, a Scotch verdict of "not proven" must be given against him. However it may be as regards Shakespeare, there can be no doubt that there has existed in all ages a sort of occult freemasonry of friendship between law and literature. The stern disciples of Themis and the volatile votaries of the Muses have always lived on the best of terms, and the happiest results have followed to both from the blending of the most opposite qualities. Law is not so dry a study as the uninitiated suppose; for it has within its sphere both the tragic and comic drama, and oftentimes the elements of the strangest romance. Aristotle was perhaps the highest type of what the profession calls a "legal mind;" yet D'Alembert has said that Aristotle had as great an imagination as Homer, and that had he bent his genius to poetry, he might have equalled, if not excelled, the *Iliad*. Be that as it may, it is evident the legal and logical mind of Aristotle was enlivened and enlarged by an exhaustive study of Homer's works. The greatest orators and lawyers of Greece and Rome are loud in their expressions of gratitude to Homer and the other Greek poets. "They read them by day, and studied them by night," and drew from them grace, inspiration, and wisdom. But the converse of the proposition is not quite so obvious, that some of the greatest poets and prose writers of ancient and modern times have had their wits sharpened, and their fitful fancies tamed down and restrained within the bounds of propriety and common sense, by an early corrective course of legal study. Such however is the fact, and, so far as our limited space will permit, we intend to adduce some illustrious examples in support of this proposition. Let us select one from among the Roman poets. On entering the forum, who attracts our gaze? The gay, graceful, eloquent and witty poet, Ovid, dressed in a flowing robe, busily engaged pleading causes before the Prætor with all the acuteness of a practised lawyer. A crowd of clients are standing around him, and in front one sees his old greyheaded father listening with all a parent's pride to his son's youthful eloquence, and predicting that he will rise to the highest judicial offices of the state. For a while Ovid devoted himself assiduously to the law, and humoured his father's wishes. He got, and filled with credit, several judicial offices, but the Muses who had rocked his cradle were determined that the child of their choice should not be altogether lost to the world. So they threw the young lawyer in the way of Propertius, Macer, Ponticus, and other eminent poets and wits of that day, and weaned him away from the company of lawyers. Still clients came to him, and a struggle

went on between his ambition and his pleasure—between duty to his father and the duty which he owed to himself, to the genius within him which was vainly struggling for utterance. As a last resource, the Muses plunged Ovid in love, and their conquest was then complete. Themis and his old father withdrew from the forum crestfallen and disconsolate. Young Ovid will never adorn the judicial bench; but do not weep, old man, thy son will have a poet's, if not a prophet's, mantle of glory thrown around him for all time! But what shall one say of Ovid's predecessor, the great Cicero? One might write a volume to show how much he was indebted to the law, and how much the law was indebted to him. He united the two professions of law and literature in a loving and lasting union, of which his works are the fruit. Cicero rose to the consular dignity, and saved his country from a great danger; but we believe his life would have been happier and his fame greater if he had quitted the law and politics, as Ovid did, and devoted himself exclusively to letters. No man can well serve two masters, and though Cicero tried to do this, and won honour in both law and letters, yet his strength, and, we think, his mental treasure as well as pleasure lay in literature. He was a great prose poet, and his popularity as an author is owing to the knowledge of the world and the human heart which as a lawyer he acquired. The Romans were a more common-sense, legal, and less imaginative people than the Greeks; more a stern race of warriors and jurists than poets and philosophers. Hence, with the exception of Virgil, one finds the works of most of their authors and poets levelled and regulated down, so to speak, to the consistency and tone of a code of laws. Genius and enthusiasm are there, but "cabined, cribbed, and confined," and held under restraint by a despotic will. The only way one can account for this is by supposing that the divine *afflatus* of the poet was somewhat dried up by the course of legal study which every Roman had to undergo.

Shining through the darkness of the middle ages, one lights upon the lonely, loving, and somewhat melancholy poet, Petrarch, as he sits studying the Pandects at the University of Bologna, whither he had been sent to acquire a knowledge of the law, to enable him to carry on the lucrative business of his father, who was a Florentine notary. The professional knowledge which Petrarch gained was useful to him in after life. It made him an apt man of business, and fitted him to carry through many negotiations important to his country. Besides, Petrarch's apprenticeship to antiquarian and legal lore may have led him to collect and collate, as he did, some of the most valuable manuscripts of the ancient classics. His great contemporary, Dante, was not bred to the law, but as he acted for some years as one of the chief magistrates of Florence, it is not unreasonable to suppose that he was well-versed in the laws and customs of his country. His countryman and successor in the

laurel, Ariosto, attended the University of Padua, and devoted five years of his life to the study of the law. Disliking the profession, he ultimately abandoned it, and his father unwillingly consented to his doing so; but the knowledge he had got became ingrained in his nature, and was not without its use in after life. It enabled him, like Petrarch and Dante, to take part in public business, and conduct many negotiations.

Leaving Italy and entering France, we find that "old Montaigne" studied law for some years, and was afterwards a counsellor in the Parliament of Bordeaux. The ease and quiet of a country life had, however, greater charms for him than the turmoil of the wordy bar, and so he retired to his paternal property, and gave the world the fruit of his meditations in his celebrated "Essays." The "great Corneille," father of the French drama, was the son of a lawyer who practised at Rouen. Corneille tried the law for a short time, but gave it up in his twenty-third year, and devoted himself to the drama, with what success the "Cid" and all France can testify. Boileau belonged by descent and connections to a family of lawyers. The good-natured boy, who would never speak ill of any one, passed as an advocate at the age of twenty-one, and tried but failed to get into practice. What a blessing to the world that he did not succeed! Had he done so, French law would not have been much enriched, and its literature would have lacked some sparkling satires,—especially the ninth one, wherein he shows his legal learning and knowledge of the lawyers of his age.

The greatest literary name in France is that of Voltaire. Yet he, too, was a lawyer, the son of a notary of good repute, named Arouet, who had an extensive practice as a conveyancer. The ambition of the father was to see his son follow in his footsteps. For this purpose he put him for some time into a lawyer's office, and then sent him to the Hague to study Theodosius. Fate, however, had other work for the young Voltaire than to pore over musty parchments. He passed at the bar, but not liking the employment, speedily deserted it, and soon after, for want of a sufficient knowledge of the law of libel, got himself shut up in the Bastille, where he was confined for a year. He had a somewhat low opinion of lawyers, and he defines "*un avocat*,"—says Mr. Morley, in his recent *Life of Voltaire*—"as a man who, not having money enough to buy one of those brilliant offices on which the universe has its eyes fixed, studies for three years the laws of Theodosius and Justinian so as to know the custom of Paris, and who at length having got matriculated, has the right of pleading for money with a loud voice."

The two greatest poets of Germany, Schiller and Goethe, were both students of law. Schiller was compelled to study it for two years, and then left it for medicine. Goethe, however, seemed to have had a lingering affection towards the legal profession, as opening to him a new intellectual pursuit; for though his legal

studies at Leipzig were desultory, and broken in upon by youthful frolics, he afterwards recurred to and completed them at Strassburg, by taking the degree of doctor of laws. Thus far we have shown, and we hope satisfactorily proved, that some of the great poets of Rome, Italy, France and Germany, were more or less tinctured and imbued with the study and practice of the law. Law and letters go hand in hand, and the intercourse between them has been beneficent and beneficial. Our remarks hitherto have been limited to foreign writers; let us trace and see whether English literature shows any signs of this happy union of law and letters. Going to the well-spring of English poetry, what do we find? Tradition says, for there is no certain history, that the father of English poetry, Chaucer, studied law at the Inns of Court. His life and works somewhat confirm the truth of the tradition; for he got early into public employment, and the author of the "Canterbury Tales" must have been a many-sided man; with more than a lawyer's acuteness of observation, knowledge of the world, and business capacity. In his "Canterbury Tales" he defines the character of a "Serjeant at Law" in such a life-like manner, "who was always busy, yet seemed busier than he was," that we cannot but think Chaucer drew it from his own experience at the bar. His friend and follower, Gower, was a student of law at the Inns of Court, and, it is said, he afterwards reaped the reward of his legal labours by reaching the dignity (how rarely obtained by a poet!) of becoming Chief Justice of the Common Pleas. It is to be hoped the laurel of the poet brought no discredit on the ermine of the judge.

The most poetical of poets, the gentle Spenser, who seems to have been of imagination all compact, cannot have had anything in common with harsh-grained law, or legal pursuits; and yet it may be said he lost his own and his child's life, and what was more precious to him and the world than even life itself—his unpublished manuscripts—in faithfully fulfilling his duty as a lawyer and a magistrate. One is puzzled at the statement, and hesitates to believe that the author of the "Faërie Queen" was a lawyer. Yet it is a fact that Spenser was one of the Clerks of the Irish Court of Chancery, and afterwards, in 1598, made Sheriff of Cork, and it was while endeavouring, in the capacity of Sheriff, to quell the rebellion of Tyrone, that his castle of Kilcolman was burned, and his child perished in the flames. The horrors of that terrible night preyed on his sensitive, affectionate mind, and the poet died of grief in London the year after. From Spenser one naturally turns to Shakespeare, to know if he, too, was a lawyer? The important, bustling, little attorneys of Stratford, who enjoyed his wit and shared his satire, are silent on the subject, and have left no indenture to show that "sweet Will" was bound their apprentice. But those of our readers who wish to know the arguments in favour of Shakespeare's having studied law, cannot do better than read Lord Campbell's book, where they are clearly and ably set forth.

The name of Bacon is dear to literature, and his *Novum Organum* marks an era in the history of science; but it would be well for his character and fame could a veil be drawn over his conduct as a lawyer. He was a Barrister of Gray's Inn, and rose rapidly in his profession, first to a silk-gown, then to be Solicitor-General, Attorney-General, and ultimately Lord Chancellor. Good fortune seems then to have forsaken him, and his after history may be summed up in the severe but graphic words of the poet:—

“The greatest, brightest, meanest of mankind.”

In his evil days he busied himself with preparing a digest of the laws of England, and found solace and comfort from those literary studies which had adorned his prosperous fortune.

The poet Drayton was not a lawyer, but he was so much a friend of the great lawyer and antiquary Selden, that Selden wrote all the notes and illustrations to Drayton's “Polyalbion,” or poetical history of England; and, therefore, when one thinks of the poet Drayton, it is meet to remember the lawyer Selden, whom Milton speaks of as “the chief of learned men reputed in this land.”

The muse of Ben Jonson does not seem to have been subjected to a course of legal study, but his most intimate friends and patrons were lawyers, and he showed his esteem for the profession by dedicating his play of *Every Man out of his Humour* to the Inns of Court, “the noblest nurseries of humanity and liberty in the kingdom.” In this dedication he says, “I understand, you, gentlemen, not your houses: and a worthy succession of you, to all time, as being born the judge of these studies. When I wrote this poem, I had friendship with divers in your societies; who, as they were great names in learning, so they were no less examples of living”—a noble testimony to the merits of the barristers of that age from one not over profuse in praise. It was to show his friendship for and to visit a plaintive Scottish poet and advocate,—Drummond of Hawthornden,—that Jonson made his memorable journey on foot from London to Edinburgh. In Drummond's classic shade he met and conversed with the ablest and best of the Scotch lawyers of that age, and carried away with him many a racy anecdote of the rough doings of the Senators of the College of Justice for the amusement of his more polished friends at the Inns of Court.

The poet Drummond was a member of the Scotch bar, and President Lockhart is stated to have said that had he followed the legal profession he would have made the best figure of any lawyer of his time. Unfortunately for his success in law, however, Drummond fell immoderately in love with a young lady, who returned his affection, but died before her time. Inconsolable for her loss, he went to the Continent, and tried to divert his grief by travelling through France, Italy and Germany. Eight years of absence from attendance on the Court destroyed his prospects of success at the bar,

but made him an accomplished scholar, and one of the most elegant of Scottish poets.

The names of Beaumont and Fletcher are redolent of law and lawyers. Francis Beaumont was a member of the Inner Temple, and came of a race of lawyers and poets. His grandfather, John Beaumont, was Master of the Rolls, and his father, Francis Beaumont, one of the Judges of the Common Pleas. Honoured and esteemed in their profession as these judges were, the name of Beaumont would have long since perished from memory, had it not been for the merits of the poet and dramatist, who has given it a local habitation in literature, and made it illustrious for all time. Beaumont made no great figure as a lawyer, nor is it to be wondered at, when we consider he lived only thirty-three years; and yet how in that short space of time he managed to improve and enrich our literature with fifty-three plays, some of them the finest in the language. No young Thurlow or Erskine, toiling towards the woolsack, ever worked harder! Nor was this the best and only outcome of this noble-minded man; for, in union with Fletcher, he showed the world that friendship was something more than a name, and that literary men can live and work together without envy or jealousy. The *Mask of the Inner Temple and Gray's Inn* was written by Beaumont at the request of these societies, and performed before King James and his Queen at Whitehall, on the 20th February 1612. It is dedicated "to the worthy Sir Francis Bacon, His Majesty's Solicitor-General, and the grave and learned bench of the anciently allied houses of Gray's Inn and the Inner Temple." "You (he says) that spared no time nor travel, in the setting forth, ordering and furnishing of this Masque (being the first-fruits of honour of this kind which these two societies have offered to His Majesty), will not think much to look back now upon the efforts of your own care and work. . . . And you, Sir Francis Bacon, especially, as you did then by your countenance and loving affection advance it, so let your good word grace it and defend it, which is able to lend value to the greatest and least matters."

The witty poet and dramatist, Congreve, who at the age of twenty-three had risen to such distinction that Voltaire visited him in London, was entered as a member of the Middle Temple, and would have joined the bar had his exuberant wit and Irish spirits not led him to literature. The great success of his comedy the "Old Bachelor," kept him from ever again renewing his legal studies. Among other dramatic authors who were or intended to be lawyers, we find that Nicholas Rowe, the author of "Jane Shore," and the translator of Lucan's "Pharsalia," was a barrister and the son of a serjeant-at-law. The elder Colman, the author of the "Jealous Wife," was also a member of the same profession; and a greater than either, Richard Brinsley Sheridan, author of the "School for Scandal," entered the Middle Temple, and might have become a learned lawyer had he not run away with and impru-

dently married one of the most beautiful and accomplished singers of his age. This changed his destiny, and made him an unrivalled writer of plays, a delightful dinner companion, and one of the most accomplished and eloquent speakers in the House of Commons. His great rival and contemporary, Edmund Burke, the son of a solicitor, was destined for the bar, and entered the Middle Temple, but legal studies had no charm for him, and he early forsook them for more congenial pursuits. His contempt for lawyers is only too well known, and was only too coarsely expressed. David Hume, the historian, seems to have had a similar aversion to the profession. On leaving the University he was sent by his father to study law; but, to quote his own words, "he formed an insurmountable aversion to everything but the pursuit of philosophy and general learning; and while his family fancied he was poring over the works of lawyers and jurists, Cicero and Virgil were the authors he was secretly devouring." "The good David" devoted himself thoroughly to the work to which he felt himself inwardly drawn, and he had and has his reward. In 1752 the Faculty of Advocates made him their Librarian, and, it is said, suggested to him the idea of writing his *History of England*. Whether that be so or not, the materials of his history were drawn from their library, and his connection with it and them is one of their proudest recollections. Long may it continue so! and dear to every member of the Faculty should be that library in which Hume, Robertson, Sir Walter Scott and Macaulay in the past, and Carlyle, Laing, and Burton in the present, have worked and rendered memorable by their presence.

There is no body of lawyers who have had a more intimate connection with literature than the Scottish Bar has had. No branch of the legal profession has rendered so important services to literature; and the most brilliant era of the Scottish Bar—the commencement of the present century—was that in which the connection between law and literature was most intimate. Every schoolboy—we do not mean Macaulay's schoolboy, who knew everything, who was Scaliger, Casaubon, Bentley, and Porson combined; and we do not mean the common specimen of to-day, who knows nothing except cricket and the odds for the Oaks—we refer to the medium type that existed ten years ago, and of which there are still some specimens to be met with,—every schoolboy knows the eminent names of the Scottish lawyers who brought fiction to its highest pitch, or who made of periodical criticism a new art. Towering high over all, as the Castle towers over the turrets and spires of his own marvellous city, stands the great name of Walter Scott—the greatest name which law has given to literature. The son of a Writer to the Signet, Scott passed as advocate in 1792, had some little practice, was made Sheriff of Selkirkshire, and also Principal Clerk of Session. As Clerk he sat in the First Division of the Court of Session, and conceived and composed some of his



novels there, all unconscious of the debates and strife of the bar and bench. The connection between law and literature in his case was not slight, far-fetched, or accidental. It would be safe to say that his novels would not be what they are, would not be so good as they are, if their author had not been a lawyer. Litigants, lawyers of every degree, proceedings in courts of justice—all these figure in his pages. The imaginative literature of the world would be sensibly poorer if it wanted the character of Peter Peebles, and no person but a Scottish lawyer could have created such a character. The Miss Flite of Dickens is weak and tame when compared with the Peter Peebles of Scott. Another type of litigant we have in Dandie Dinmont, who did not make a passion of litigation as Peter did; who treated it as a luxury, one which a "bein" man like him could afford. Then we have lawyers of all sorts and sizes, from Counsellor Pleydell down to Gilbert Glossin. How well he tells a story of a trial. Every time you read the trial in the Heart of Mid-Lothian, you admire the truth, the fidelity to nature, the grasp, the sagacity, the humanity of the man. To come to the *Dii minores*, there were in those times the *Edinburgh Review* men, Jeffrey, Cockburn, and the rest of those now somewhat faded shades, who stalk through the halls of the Whig Valhalla; Wilson, Lockhart, and others of the mad wits and truculent Tories of *Blackwood*. Then in more recent times you have Aytoun, whose serious rhymes are rather of the brass band order, but whose humorous pieces are delightful; and a certain "Old Contributor," whose songs and verses in "Maga" have recently come to a fourth edition.

Not a few poets who have come to eminence have performed the lower functions of the law; they have been writers' clerks, or something of that kind. It may not be generally known that the poet (Campbell) wrote his "Pleasures of Hope" in Rose Street, Edinburgh, while he was in a hopeless and desponding condition, engaged copying law papers at threepence a page for a livelihood. Some years before the Scottish poet Fergusson had undergone the same drudgery in a sheriff-clerk's office. Butler, the author of "Hudibras," was clerk to a Justice of the Peace; and Chatterton passed some years of his short life in an attorney's office in Bristol. Whether he was a "sleepless soul" in the office we do not know, but he must have differed remarkably from other lads in offices if he was.

Tom Moore went to London with his translation of "Anacreon" in his pocket, and with very little else in his pocket, and he entered himself as a member of the Middle Temple. Southey became a student of Gray's Inn, where he worked at his poem of "Madoc," and learned enough of law to make him turn away from the study in disgust.

But it would be tedious to recount the names of all the poets, historians and men of letters who have been lawyers, or who, at least, received a legal training. Among other names which

occur to us now are those of, in Italy, Goldini, the dramatist, who was in his early career a practising advocate in Venice; Metastasio, an earnest law student; in Germany, Heine, who studied law at Bonn, and Uhland, a practising advocate, who also held a post in the Ministry of Justice at Stuttgart; in England, the poet Cowper, who passed the bar; and to come to more recent times, the barrister, Macaulay; the judge, Talfourd; the conveyancer, Barry Cornwall; and the chancellor and everything else, Brougham.

Thus in modern as in ancient times has a happy union and interchange of mutual benefits between law and letters been maintained and kept alive.

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### The Month.

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*The Vacant Judgeship.*—Who is to be appointed to the Judgeship vacant by the lamented death of Lord Mackenzie, is a question which naturally excites attention, not only in the Parliament House, but all over the country. We know as much about this matter as anybody at present does,—that is to say, we know nothing. It is rumoured, and the rumour is not at all improbable, that towards the end of the Summer Session, the Lord Advocate will take the vacant chair himself. If his Lordship does not take the office, then we think the appointment of Mr. Fraser, the Sheriff of Renfrewshire, would be the best and most popular appointment that could be made. There undoubtedly is no other member of the Scottish bar who has made such important contributions to the legal literature of Scotland as he has done. His great book on the "Personal and Domestic Relations" has secured him a reputation which is more than European. In many other less prominent ways he has rendered great services to the law of Scotland. We should like to know, for example, how many Reports of Committees of the Faculty of Advocates he has prepared in his time. No doubt Mr. Fraser was born on the wrong side of the present political blanket, but political inclinations we have never thought to be of paramount importance in judicial appointments. There are precedents, and not a few, for the appointment of gentlemen to judicial offices who do not belong to the same political camp as the Government of the day. More than one of the most eminent Scottish Tory lawyers of the present generation have owed their elevation to the Bench to the impartial judgment of a Whig Government, and in England we have very recently seen the high disregard of party considerations which Lord Cairns has displayed in his recent appointments to judicial offices. There is an impression among many Scottish lawyers that Mr. Fraser's claims have been somewhat neglected by

his own party. For the Tory Government to appoint him to the vacant judgeship would be a decent return for similar favours already received, and to give to a political opponent that reward of a life of labour which he has not obtained from his own side would be the most handsome, most useful, the newest and neatest way of "dishing the Whigs."

*The Law Telegraph in New York.*—The Law Telegraph Company, which has been recently formed in New York city, has its executive office at No. 261 Broadway, and its central office at 145 Fulton Street. We observe by its circular that this company has inaugurated and put in operation a novel, ingenious and valuable service intended for the use and benefit of the members of the bar. It consists in the introduction of the telegraph as a means of inter-communication privately between themselves, and also between the various courts of record, the public offices and their own offices.

The method of accomplishing this difficult and valuable feature, now for the first time applied to these purposes, is simple, effective, and easily comprehended. It is the result of laborious study and ingenious inventions. The instruments used are the dial instruments, so improved by new inventions that they are now the *only rapid and reliable* instruments suited for private use, in all kinds of weather and under all circumstances. The use of their printing instruments, first contemplated, was abandoned by this company, after many tests and experiments, as being wholly incapable of being employed for this complex service. An instrument is placed in the office of each subscriber, and easily operated even by an office boy. A similar instrument is also placed in the various courts and public offices, such as the offices of the sheriff, register, county clerk, etc., and all the wires converge at a central office of the company, where connections are made between the various wires, as they may be required, by means of signals made by the party wishing to transmit a message. Each subscriber or point connected has a number placed on a card near the instrument, and is called by striking the number wanted on a key, and messages are then sent by simply spelling or abbreviating them on alphabetical keys.

The main object and some of the distinctive features of this enterprise we are told are the following:

1. Lawyers can communicate *instantly* and *privately* with each other, and to and with the courts and public offices at all times.
2. They can likewise *instantly* and *privately* communicate *with* their own offices *from* all the courts and public offices at all times.
3. They can also send telegrams from their own offices, or from the courts, etc., to any part of the country, through these instruments, over other telegraph lines, at the usual rates.
4. Lawyers can, by special arrangement, be put into private telegraphic communication with important clients.
5. By means of operators and reporters in

and about the courts, furnished by the company, and included in the price of subscription, lawyers can receive notice of their cases as they appear on the calendars, the instant the calendars are made up each day, and timely notice of the approach of their cases on the day calendars for trial, as well as all other facts desired, and thus save the hours and even days that are frequently wasted in the attendance upon the courts. 6. Lawyers can, either from their own offices, the courts, or public offices, communicate with referees and others; send for persons, papers or books; obtain all kinds of information, etc., and in short accomplish *instantly* by telegraph, what has heretofore been done through the slow and uncertain agency of a messenger, not always at hand, thereby saving vexation and delay, frequently expensive, and often disastrous, as for instance, when such services are required perhaps in the midst of the trial of a cause. 7. Requisitions for searches or information in any of the public offices can be made by telegraph, and conveyancers can sit in their offices and continue their searches down to the very moment of passing title. 8. Among the subscribers will be found various officers and firms with whom lawyers have necessary business to transact at all times, such as the printer, the stenographer, the lithographer, and even the detective, all of whom are in instant communication. 9. Messengers can be called *at once* to go anywhere or do any thing required, a low charge being made only for the time they are employed.

The plan embraces other features, benefits and advantages, many of which will ripen with use and time. Already, over seventy of the leading lawyers and law firms in the city of New York have subscribed for, and are now using, these instruments. And it is said that nothing but commendation has come from them. The extension to Brooklyn and its courts is now under way. The terms are two hundred and fifty dollars per annum.—*Albany Law Journal*.

*Salaries of County Court Judges.*—We observe that, *apropos* of the Lord Advocate's Sheriff Court Bill, there is a movement among the Sheriff-Substitutes to have their salaries increased. To be sure there always is a movement among them of that kind and in that direction, but it never seems to come to anything. The movement is always told by the Chancellor of the Exchequer to "move on." The Sheriff-Substitutes would be only too glad, we daresay, to have their salaries raised to the level of the English County Court Judges. But while the Scottish County Court Judges are envying a little the luckier position of their English brethren, the latter we find are grumbling too. There is a movement amongst them also, and, as in the case of their Scottish friends, it is on the occasion of some proposed addition to their duties. On this subject the *English Solicitors' Journal* has some remarks which may be interesting to some of our readers. By the way, could not the two movements be combined?—a long pull, a strong pull, and a pull altogether.

"There has been a good deal of correspondence with reference to the salaries of county court judges. The ball was set rolling by Lord Lyttelton, who expressed an opinion that "these learned persons are rather hardly used," and suggested that the additional duties proposed to be imposed on them by the Agricultural Holdings Bill and the Pollution of Rivers Bill would give them a claim on Parliament for some 'improvement in their position.' He was followed by 'a County Court Judge,' who, in an elaborate letter, stated the extremely miscellaneous nature of the jurisdiction imposed on these officials, and suggested that their salaries should be increased and their *status* improved. This writer, however, was hardly quite ingenuous in his statement. The fact is, that when in 1865 the salaries of the judges were raised to £1500, the increase was made by the Act conferring the equitable jurisdiction, and in consideration of the additional work supposed to be entailed upon them by that new jurisdiction. That jurisdiction has, as a matter of fact, not materially added to their labours. According to the latest judicial statistics the number of all the equity proceedings in all the county courts was only 750 in 1869, and this number had actually diminished in 1873 to 712. At the latter date the average number of equity proceedings, even including payments in by trustees and petitions or notices filed, in each county court circuit, in the whole year, was about 12. No doubt the bankruptcy jurisdiction has added to the labours of the county court judges, but it does not appear from the same statistics that even the busiest judges were oppressed with anything like incessant work. The greatest number of days of sitting for a single judge on any one circuit was 174, or a trifle more than half the working year, and the smallest 104. Under these circumstances we fail to see any great hardship in the case.

"But for a wholly different reason we are disposed, quite as strongly as Lord Lyttelton, to advocate a substantial increase to the salaries of County Court Judges. It is the opinion of many very competent observers that a salary of even £2,000 a year might enable the Chancellor to select the County Court Judges from among the ablest men at the Bar. There are many motives besides the salary which might tempt such men to accept such an appointment. Promotion would come earlier than in the case of the Judgeships of the Superior Courts; the work is less harassing and anxious, and the life of a country gentleman has fascinations. At the same time a mere increase of salary would not be sufficient to effect the end we desire. At present it would need courage to set the example of renouncing the position of leaders at the Bar to accept Judgeships which have recently fallen only to unknown men. It is as well to speak plainly on this matter, and we must therefore say that unless something can be done to raise the *calibre* of the men who are appointed county court judges there is danger of the offer of such a position coming to be regarded as somewhat

of an insult by men of high standing. What would be said if to-morrow one of the leaders of the bar were to take a county court judgeship? Very much the same, probably, is if he had married his cook. Yet the office is one of immense importance, since the county courts are the only civil tribunals of which half the people of England have any experience."

*The Law of England before the Conquest.*—Dr. Sebastian Evans lectured on the 18th ult. to the members of the Birmingham Law Students' Society, on "The Law of England before the Conquest."

Dr. Evans opened his lecture by remarking that—as he supposed he need scarcely tell them—the law of this country was divided into two branches, the statute law and the common law. The statute law, as they would know, consisted of the Acts of the English Parliament for a great number of years, and the common law was that traditional law which had been handed down from our ancestors from immemorial date, and which was called the unwritten law, not because it had not been written down in commentaries and the like, but because its origin had not been a statute but a custom of immemorial usage. It was a curious fact in our history that there never had been any great revolution in our common law, however far back we went. If we went back to the Revolution of 1688, we found the common law remained unaltered; and at the Reformation, although the validity of the common law in certain respects was limited, yet it remained the same. Still further back, to the time of Edward I., who was the greatest codifier of our kings; what that king codified was simply the law existing at his time. Going to the time of the barons' wars, to the time of John, to the Conquest itself, it would be found that the common law of England had remained in all its main features unchanged. The Conquest was generally supposed to have introduced a far larger change in our jurisprudence than it had really done. One of the first great works undertaken by William the Conqueror was the restoration of what had been known as the laws of Edward the Confessor. The laws of Edward the Confessor were in the main the same as the laws of Alfred. Going back to the latter, it would be found that he stated that he had collected the laws of the various countries which at the time formed England. Having submitted the best of those laws to his Parliament, what he had promulgated were the old laws which had been settled and agreed upon by his Parliament. Even at the date of King Alfred—just a thousand years ago—these laws were of immemorial antiquity; so that the common law of Scotland a thousand years ago was in its main features pretty much as it was at the present time. If we went back to the very early period of the Saxon invasion of England—and in respect of this he wished them to understand that the term "Saxon" was applied to the people of any country who chose to settle, that it meant "settlers," in fact—it would be found that historians suddenly made a leap of some centuries to

the days of Tacitus first, and then to the days of Julius Cæsar. Our historians represented that that was the origin of English common law, but were right only to a very small extent. Our common law undoubtedly had its source in Germanic customs, the customs of those tribes which inhabited the regions of the Rhine and the Elbe. There were several features in the common law which were possessed by our continental brethren. One of them was the money payment according to the rank of a person murdered; the murderer had to pay a certain amount, and was executed as well. Then the system of ordeal was common to us, and a number of other people tracing themselves to Germanic origin. In English common law, however, there was a department which was not to be accounted for by the customs of our Germanic forefathers; the law relating to land and the tenure of land. Looking at the Anglo-Saxon polity, it would be found that society was divided into two great classes, the land-holders and the land cultivators, the earls and the churls. The estate of the earl appeared to have been of a very limited character. Except by leave of the king, the thane could not sell his land nor will it; it was perfectly clear, therefore, that in legal theory, if not in practice, the land was resumable at any time by the Crown. But, although for a great many offences against the law the forfeit was lands, there were in certain places in England, and notably in Kent and East Anglia—Norfolk, Suffolk, Essex, and that part of England—small manors and holdings which were not liable to be forfeited. These were so free that no penalty would bring them within the power of the king. A man might be attainted, and yet such land would pass to his successor as if he had not been attainted. The condition of the churl, compared with the condition of the earl, was that of a *servus terræ*. He could not go away from the land. If he did he was held to have stolen himself, and was accordingly found guilty of felony. On the other hand, he had certain privileges; his lord was bound to defend him if any one attacked him, and he was not to be disturbed in his holding. He could even will his cottage to his children, his lord having no power to take it from him. The land itself all over England was divided by hedgerows and ditches, so that when an estate was bought, the parcels of it could be laid with very considerable certainty. This he (the speaker) noted especially, because it was not the Germanic custom, nor was the power of bequeathing land. Among the old Germans, land went by a certain defined system of succession, and no man could alter it. Our early forefathers had not the power to will away the whole of the lands. The widow had her portion, and the part which the man himself could will away was known to Saxon lawyers as "the dead man's part." If a landholder died intestate, his land, by the Anglo-Saxon system, did not go to his eldest son, but was divided equally among his children. As these laws were not Germanic, the question was, where did they come from? By the Roman

law the position of the landholder and churl were the same—the land was divided by hedgerows and ditches, and was transmitted to a man's posterity under the same conditions. The Roman officer had not absolute property in the land, but his estate was *possessio*—it was resumable at any time by the emperor. Besides this, circumstances remained which he (the speaker) thought seemed to clinch the argument he was advancing. Land, under the Anglo-Saxon system, had three duties laid upon it—"needs," as they were called. Every hide of land had to contribute towards three special things—the "burgh bote," the "bridge bote," and the "fyrd." The first of these was the keeping in repair of the fortifications and walls of the principal city, as London in Middlesex, and Warwick in Warwickshire; the "bridge bote" was the maintaining the bridges and highways in the district; and the "fyrd" was a sort of conscription, each hide of land having to find so many soldiers for the king whenever warfare required their services. In the time of Justinian the Roman law had enacted that all lands should be liable, in proportion to their extent, to four things: (1) The keeping up the city walls; (2) the keeping up the bridges; (3) the keeping up the highways; (4) the providing men for the army. So that, although the Anglo-Saxon law reduced the four things to three, still the three "needs" of the Anglo-Saxon law were precisely identical with the conditions under which the land was held by the Roman soldiers. And he (the speaker) thought it would be impossible to adduce any stronger argument in proof of the fact that the system of landholding under the Saxons was, in fact, the Roman law. The churl was liable to be found guilty of felony if he left the land, under the Roman law, as with the Saxons. The power of willing was also a Roman and not a Germanic institution; and under the Roman law the lands of an intestate were inherited by all the children equally. The Saxons had come to England about the year 450, and English historians represented that in the course of considerably less than 150 years those irrepressible gentlemen, from having come over in three ships, had made themselves masters of England from the Isle of Wight to Edinburgh, and from Norwich in the east to Shrewsbury in the west. They were also credited with having established the whole of their institutions, and to have eliminated whatever might have been left of any previous civilisation in the kingdom. His own idea was that the people of this country spoke English before Cæsar had set foot in England. Cæsar himself told him that when he came to Britain he found the whole of the southern part of the southern country occupied by Belgic tribes; and he (the speaker) thought it might be proved distinctly that the language those tribes had spoken was our own language at the present day. The people who had come over in the fifth century were closely allied to the people who were already settled. The former had stepped into the position vacated by the Romans, and had become the earls, while the residents had remained simply churls.



*English S.S.C.'s.*—The following amusing letter appears in the *Law Times* of 22nd May:—

In a very short time the Supreme Court of Judicature will be an established fact. We English solicitors will be entitled, in common with our Scotch brethren, to write after our names the distinguishing marks of our degree. It is to be hoped that, like the Edinburgh solicitors to the Supreme Courts, we shall employ, in our correspondence, and on our doorplates, the proper initials "S.S.C." after our names. They are to us what the letters "M.R.C.S." are to a surgeon, the "M.A." to a parson, or the "M.R.C.P." to a gerund grinder for small boys. Our status is at length to some extent realised, for having been professionally trained, and finally examined by the heads of our college, the Law Institution, the Legislature has at last allowed us to assume a fixed and certain degree. Would it not be as well, in the light of our improved social status, to imitate our Edinburgh friends, and to elevate our Law Institution into the position of a "Faculty of Law," with a dean of the faculty, a proper president, and officers under him? Would it not be wise also to procure some definite regulations as to the use of the gown by the new S.S.C., in the courts in which he will have audience? For my part, not only in courts, but in private life, I should be glad to see a hard and fast line adopted as to dress, such as obtains with the clergy. If we are members of a learned profession (and there can be little doubt that to become a S.S.C. requires harder work than to obtain by a judicious system of "cram" the B.A. or M.A. of our universities), we should revolt against the practice of many of our brethren in dressing as much like farmers, or mechanics in their Sunday clothes, or turfy scamps, with tight trousers and horsey pins in their spotted neckties; or else apeing the costume of fast men about town, whose brains could never rise to the consideration of "the rule in *Shelley's case*," or to the definition of "estate by the curtesy." We do not, I assume, wish to be considered military men or billiard markers, and there seems, therefore, no reason why we should have our hair cropped after "regulation pattern," or shave our chins in order to develop the moustache into campaigning proportions. A modest suit of a certain cut for the streets; a sort of shorter cassock say, so as not to be too clerical, for the office; a gown in court, and a hat of some easy but well-known shape, would be far better attire for the members of a learned and ancient profession than the motley garb in which they now array themselves. It only needs a few of our leaders to set the fashion and make it the "right thing to do," and a question of "good taste," and then all will follow.

*Seaworthiness.*—The Court of Queen's Bench had recently to consider (in *Dudgeon v. Pembroke*, 22 W. R. 914, L. R. 9, Q. B. 581), the double question of when a loss can be properly attributed to perils of the sea, and when to unseaworthiness. There the ship perished by going ashore, after labouring for some days in a storm. In *Anderson v. Morice* (23 W. R. 180, L. R. 10, C. P. 58), the question arose how far a verdict of seaworthiness and loss by the perils insured against could be sustained on behalf of a ship which sunk in smooth water from an undiscoverable cause, and soon after the attaching of the policy. "The significance of such a fact," the Court say, "cannot be displaced by mere opinion founded on mere conjecture. We think that the true significance of such evidence is to be termed a presumption, and a shifting of the burden of proof; and that where such a fact is the only fact in evidence, there being no other evidence as to the condition of the ship, or as to a cause of loss, it is evidence on which a jury ought to find, and should therefore be directed to find, if they believe the evidence, that the ship was unseaworthy at the inception

of the risk. But where there is other evidence of the condition of the ship, or of a cause of the loss, then the fact of the ship sinking in smooth water becomes one of several facts which must all be left to the jury. If from other facts—such as a large amount of repairs recently done, careful surveys recently made, excellent conduct of the ship up to a time immediately preceding the loss, or otherwise, a jury conclude that the ship was seaworthy at the inception of the risk, then the jury may further find that the loss was occasioned by a peril insured against, though they are unable to ascertain or safely conjecture what it was which caused the ship to sink." Upon evidence of this kind the court allowed the verdict to stand, although the judge who tried the cause would have arrived at an opposite conclusion, but was of opinion that there was evidence on which the jury might not unreasonably have given their verdict in favour of the plaintiff.

Having regard to the circumstances of the case, the verdict seems to have gone to the extreme length in favour of the shipowners. The Court say that the principles they lay down are not inconsistent with the ruling of Lush, J., in *Merchants' Trading Company v. Universal Marine Insurance Company*, upheld by the Court of Common Pleas, and subsequently approved by the Court of Queen's Bench in *Dudgeon v. Pembroke*. But some exception may be taken to the language in which they describe the effect of such evidence as that the ship sank in smooth water, and from an unknown cause. It may be questioned whether the effect is accurately represented by saying that it is "a shifting of the burden of proof." The burden of proof is on the assured to start with; the phrase implies that by mere proof that the ship went down the burden has been already shifted. Rather, however, the burden has never been shifted; adequate proof has never been given that the loss was caused by a peril insured against. The loss was not, as in *Dudgeon v. Pembroke*, a loss proximately caused by the violence of the winds and waves, but like that in *Merchants' Trading Company v. Universal Marine Insurance Company*, so far as can be seen or known, a loss simply caused by the inability of the vessel to float. And if the proof is thus left insufficient, the question may be put whether it is not incumbent on the assured to go farther, and to show by some probable conjecture, supported by reasonable evidence, that the cause was such a cause as falls within the perils insured against. In fact, in using the phrase one of the two questions raised seems to be lost sight of; the two questions are, Was there a loss by perils insured against? and, Was the ship seaworthy? With regard to the latter of these questions, the burden is on the underwriter, and the evidence of sinking in smooth water may be *prima facie* evidence for him, and shift the burden of proof on to the plaintiff; but with regard to the former question, where the burden is on the plaintiff, the point is, whether he has ever satisfied his obligation

to proof, whether the fact proved is any evidence for *him*. In *Dudgeon v. Pembroke* the Court say, referring to the ruling of Lush, J., in *Merchants' Trading Company v. Universal Marine Company*: "He told the jury that, on the circumstances proved in the case before them, the one question which would solve it all was this—Was the leak from which the vessel foundered attributable to injury and violence from without, or to weakness from within? For if it was not attributable to perils of the seas, *that is, as he explained it*, the violent action of the elements from without, or any other casualty involved in perils of the seas, the jury could come to no other conclusion than that it was due to an inherent infirmity of the ship itself. On this direction the jury found for the defendants. The verdict was entered for the defendants, *both on the plea denying seaworthiness, and on that denying that the loss was by perils of the sea*; and the Court of Common Pleas refused a rule for a new trial, holding the direction unexceptionable. And we quite agree that the direction was unexceptionable." This language seems hardly consistent with that now used by the Court of Common Pleas.—*Solicitors' Journal*.

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### THE PEEBLES BELLS.

[We take from the columns of the *Scotsman* the following squib on the notorious case about the respective rights of the Minister and Kirk-Session and of the Town Council of Peebles over the bells, which case after a lengthened litigation has recently been decided by the House of Lords.]

OH! these weary Peebles Bells!  
 What a tale of litigation their tintinnabulation tells!  
 Would that they had never sounded,  
 Would to goodness they were *drowned*  
 In the very deepest of Artesian wells.

Ah! once upon a time  
 It was sweet to hear their chime  
 On a pleasant Sunday morning as it floated o'er the fells.  
 Now their tinkling  
 In a twinkling  
 Brings a sharp and sudden inkling  
 Of a thought half sad, half funny,  
 That a regular pot of money  
 Has been wasted on this business of the bells.

Even the solemn funeral knells  
 Seem commingled with the yells  
 Of the Bailies and such swells,  
 Who appear to be rehearsing

Curses deep and loud on Cairns,  
 And the other devil's bairns,  
 Who for once are not reversing,  
 Only varying—the decision  
 Of the Second,—nay, good gracious! of the Premier Division.

And the steady Peebles people,  
 Living 'neath the shadow of their semi-sacred steeple,  
 When the bells begin their swinging,  
 Lo! they hasten from the steeple,  
 And they wander from the church,  
 And they leave them in the lurch.  
 Yes! they've ceased to be religious,  
 And prefer the ring-a-tinging  
 Of hotels,  
 To the pious but litigious  
 Peebles Bells.  
 And the swells,  
 Being too sick  
 Of their rather legal music,  
 Give their whole attention to the belles,  
 To the pretty little Peebles belles.

C.

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### Reviem.

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*An Introduction to the History of the Law of Real Property.* By  
 KENELM EDWARD DIGBY, M.A., of Lincoln's Inn, Barrister-at-  
 Law. Oxford: at the Clarendon Press. 1875.

THIS is one of the handy and useful Manuals of the Clarendon Press Series. The author's object in writing the work before us was, he says,

"To attempt in some degree to supply a want which at present greatly impedes the study of English law at the Universities. There is no really elementary work on the English law of real property adapted for students who have not, and may never have, any practical experience in the working of the law. Almost all elementary books have been written from the professional rather than the educational point of view; excellent as many of them are as introductions to a practical knowledge of law, they are scarcely available for purposes of legal education at an University. Blackstone's treatise stands almost alone in adequately satisfying both demands. It has been the fashion of late to dwell on the defects rather than on the merits of that great work, and there are obvious reasons why it is hardly adapted to the requirements of the present time. Nevertheless Blackstone still remains unrivalled as an expositor of the law of his day."

From which last sentence, it will be observed, that Mr. Digby has a different opinion of Blackstone from that of the late Jeremy Bentham, although perhaps his estimate is not quite so high as that of the American lawyer and poet who says—

“Where shall we look, but to the great Creator,  
For one superior to our Commentator !”

Mr. Digby's method of treating his subject is the historical.

“In considering the mode in which the elementary principles of the important branch of English law, which is the subject of this treatise, can best be dealt with, there can be little question that it is necessary to begin by sketching the history and development of rights over land. Hardly one of the main classifications of these rights which is recognised at the present day—the distinction, for instance, between the legal and the equitable interest, the notion of an *estate* in lands with its consequences, as distinct from *property* in things personal, the distinction between freehold, leasehold, and copyhold tenure—can be explained without tracing if possible the origin, at all events the development, of these conceptions. It seems therefore necessary in order to explain this branch of the law to start from the earliest elements of English law, and to trace the development by the action of the tribunals and of legislation of the germs which are found in our earliest authorities, till we are at last enabled to give something like a systematic classification of the congeries of ancient custom and mediæval and modern innovation called the law of real property.”

The author has divided his subject into ten heads, a recital of which will give an idea of the nature of the contents : (1) Elements of the Law of Land before the reign of Henry II.; (2) Law relating to Land in that reign; (3) Law relating to Land till the end of Henry III.'s reign; (4) Legislation of Edward I.; (5) Completion of the Common or Earlier Law; (6) Origin and Early History of Uses or Equitable Interests in Land; (7) Statute of Uses and its principal effects on modern Conveyancing; (8) Law of Wills of Land; (9) Abolition of Military Tenures; (10) Titles or Modes of Acquisition of rights over things real.

There is not in the book, and from its object there could hardly be, any pretence at original research; but the student is put on the right track, and is directed to the proper kind of books to look into, supposing he wishes to continue his historical studies. We extract the following passage, in which an account, founded on the works of Von Mauser, Nasse, Maine and Stubbs, is given of those “Village Communities” of which so much has been written, and the existence of which in Great Britain may be said to have been discovered within the last few years:—

“Besides the opposition of folcland and bocland, the proprietary rights over each, and the relation of the king or other chief to the land, there is another feature of Teutonic custom which must be taken into account in an investigation of the early history of the English law of land. There has been of late much attention bestowed on the history of the ‘Village

Community' of the Teutonic races. It appears that England does not, as has been supposed, present an exception to the agrarian customs which are found prevailing in other nations of Teutonic origin. We may reasonably conjecture that when the bodies of Teutonic invaders occupied the conquered land, they broke up into small village communities, reproducing the characteristics which undoubtedly prevailed in the land from which they came.

"Each community occupied a territory or mark, which was a portion of the public land. This territory was divided into three, or rather four portions. There was, first, the township, in which the houses and their surroundings are appropriated and held by the heads of families in individual proprietorship. These, as has been already said, must from the earliest times have been held as individual rather than as public or common property.

"Secondly, there was the arable portion, or the district of cultivated land, in which separate plots were held, for a time at all events, in severalty, by individual members of the community, subject to certain customary regulations as to common cultivation and enjoyment. The most common of these were that the arable land should be divided into three fields (*campi*), one of which should lie fallow every third year, and that the whole community should have rights of common pasturage on the fallow portion, and on the stubbles of the cropped fields at certain periods between harvest and seed-time. It appears probable that these three fields were not always on the same spot; fresh land would be broken up, and land which had been cultivated would go out of cultivation and be used only for pasturage. It would necessarily follow that the portions of land allotted to individuals were not held by them as permanent or separate property; they were beneficially enjoyed for a time, and then returned to the common stock, the proprietor receiving other allotments in their place.

"The meadow-land was dealt with in a similar way. It was open for common pasturage during the interval between hay-harvest and the new growth of the grass. It was then fenced off in separate parcels, which were for the time appropriated to the various heads of families.

"Lastly, there was the common land or wastes not appropriated to individuals at all, on which the whole community had rights of pasturage, wood-cutting, or the like. The various rights over this territory were regulated by the village assembly, consisting of all the freemen. It is very common at the present day to find that an idea still prevails that the parishioners assembled in vestry have the power of regulating rights over the waste lands within the parish. Acts of control are frequently exercised over such lands by parish officers. As will be pointed out later, there is at the present day, except under special circumstances, no legal justification for this notion; it doubtless descends from a time before the lawyers had precisely defined the relative rights of the lord of the manor and of commoners having common appendant, appurtenant, or in gross. See the observations of Lord Chancellor Hatherley in *Warrick v. Queen's College, Oxford*; Law Reports, 6 Chancery Appeals, p. 723."

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## Obituary.

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### LORD MACKENZIE.

THERE are few persons connected with the Supreme Court of Scotland who will not mourn for the loss of the kind, honourable heart, and who will not miss the handsome face and figure—the presence which gave the world assurance of a man—of him who with that familiarity which does not breed contempt but is itself bred of liking, was even after his elevation to the Bench universally spoken of as Donald Mackenzie. Lord Mackenzie died at Norwood, near London, on the 19th of May, at the, for a judge, premature age of fifty-seven. Tall, handsome, alert, with a vigorous step, you would have thought twelve months, nay, a less time ago, that many years of usefulness were still in store for him. But “comes the blind Fury with the abhorred shears and slits the thin-spun life.”

Advocates and barristers turn doctors, divines, professors, members of Parliament, and many other curious things; but it is not often that a doctor turns a lawyer. Lord Mackenzie was an instance of this unusual professional transmigration. He was educated for the medical profession, and we believe he practised for some time at Lasswade, a village near Edinburgh. Then he turned his mind to the law. He passed as advocate in 1842, was appointed Advocate Depute by the Whigs in 1854, Sheriff of Fife in 1861, in succession to Mr. Earle Monteith, and in 1870 a Judge of the Court of Session upon the death of Lord Barcaple. The late learned Judge never was in the front rank, or esteemed to be in the front rank, either as a counsel or a judge, and his abilities throughout his whole career met with a reward not below their due. But no one grudged his success. There was indeed no one who did not rejoice in it. And the reasons for this were obvious. It was just because he grudged nobody any success or promotion; it was just because he was an unselfish, honourable, frank, joyous, impulsive gentleman. Everybody liked him; he was worthy of that universal liking; and when he died there was no enemy or detractor—there was no one who had not a kindly thought of him who will long be remembered as Donald Mackenzie.

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## Correspondence.

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### THE LORD ADVOCATE'S SHERIFF COURT BILL.

EPHRAIM v. JUDAH.

26th May, 1875.

SIR,—It seems to me matter of deep regret that the Lord Advocate's Sheriff Courts' Bill should as yet have been only the plaything of con-

flicting interests. The country agents, with a wonderful unanimity, support it. The "Edinburgh lawyers," on the other hand, either altogether oppose it or endeavour to mutilate and weaken it. The former see in it only the harbinger of a more fruitful practice. The latter regard it only as a dangerous intruder on their preserved grounds. In one sense, however, it appears to be a truly national measure, and not a party one, for the Lord Advocate has found no more severe critics than in the ranks of his usually faithful followers. This is, however, as things should be, for politics have nothing, and ought to have nothing, to do with legal reforms.

Now, it is because I regard this measure as only the first of a series of beneficial and much called for legal reforms, that I view it, faulty in some respects though it may be, without that hostility which some Edinburgh lawyers evince. And I would endeavour to show in a few sentences that this measure, *if properly and promptly followed up by others*, which I shall specify, is destined to inflict injury upon neither Edinburgh lawyers nor the Court of Session; and I would express the hope that the somewhat selfish policy which has hitherto swayed both town and country lawyers with regard to it, may give place to a broader view of legal procedure, and thus result in a benefit not merely to both supreme and inferior court lawyers, but, what is of greater importance, to the country at large.

Grant that this measure pass into law *on the distinct understanding that it is only the first of a series of legal reforms*, and we shall proceed at once to take them up in their order. We shall almost immediately afterwards obtain the increase of judicial salaries both in the supreme and inferior courts, [which in a national point of view is of course the first thing to be looked at.—*Ed. J. of J.*] We shall next secure the abolition of the double sheriffship [which means the abolition of the Sheriff-substitutes.—*Ed. J. of J.*] We shall next, I hope, have civil causes heard on circuit. And last, but not least, we shall secure what is clearly for the benefit of both the people and lawyers of Scotland, viz., the taking of all Scotch parliamentary evidence in Edinburgh before judges of the Court of Session.

This series of legal reforms must have a beginning, and such I deem the Lord Advocate's bill to be. It is supported, as I have said, by the whole country bars of Scotland. It is supported by all the Sheriffs-Substitutes of Scotland. It would be good taste in, and wise policy for, the Edinburgh lawyers to yield to the wishes of these, who certainly will meet with the most respectful attention from Parliament. Our Edinburgh friends must remember that they must "give" as well as "take," and if they give up some of their privileges to their country brethren, these will be bound, and feel themselves bound, to aid in securing the legal reforms to which I have alluded.

I need not dwell upon the benefits which will certainly accrue to Edinburgh lawyers and to the Court of Session were the series of legal reforms which I have mentioned carried out in its entirety. My object in writing is to hint that, if they desire these reforms to be effected, they must go hand in hand with the provincial bars. That they will be carried out I have little doubt, although the present conflict between Edinburgh and country interests is apt not merely to delay this happy result, but, if insisted in by the Edinburgh lawyers, may, by sowing



dispeace between them and their country friends, tend to disturb, if it does not destroy, that co-operation without which the legal reforms I have advocated cannot be introduced consistently with doing justice to all. In a word, the Edinburgh lawyers may eventually find themselves in a much worse position, if they oppose this bill, than if they had supported it.—I am, &c.,

CONCORD.

### THE LORD ADVOCATE'S SHERIFF COURT BILL.

Two Sheriff Court bills have been introduced in the present session of Parliament. It is not necessary to say anything about that which was first introduced, namely Mr. Anderson's. A bill for effecting a change which, be it for better or for worse, is certainly important ought to be introduced by a responsible government, and we do not think that the public of Scotland will be inclined to invest much of their legal capital in a scheme that is floated by the late chairman of the Emma Mining Company. The bill of the Lord Advocate deserves a little, but not much more, attention. "Can't you leave it alone!" is the natural exclamation of every sensible lawyer. *Que le diable allait il faire dans cet galère?* The Court of Session has got into good working order, and I do not believe that there is any Supreme Court in the world in which cases are decided with a greater amount of combined deliberation and despatch. This being so, what was the use of the Lord Advocate interfering with the jurisdiction of that Court? Nobody was calling for an extension of the jurisdiction of the Sheriff Court. Nobody was complaining of the exclusive jurisdiction of the Court of Session in matters relating to heritable rights, and with all deference to the alarmist writers in the *Scotsman*, I doubt very much if the proposed extension of the Sheriff Court jurisdiction to cases of heritable rights would, supposing the bill is carried, be much taken advantage of. The proper thing for the Lord Advocate to have done was to have amended the procedure of the Sheriff Court and to have assimilated it to the present procedure of the Court of Session. This would have been a useful reform, and it would have afforded sufficient work for one session.

One of the proposals of the bill is most objectionable, that is to give jurisdiction to the Sheriff in all actions of reduction. There is no machinery for working this provision. Reductions are properly matters for jury trial, and everybody, except perhaps the draughtsman of the bill, knows that there are no juries in civil cases in the Sheriff Court. Such a bill as this ought to be drawn by a man who had a thorough and a practical knowledge of the procedure both in the Superior and in the Inferior Courts; otherwise a great many hitches must occur in the working of the Act. But it is clear that it has not been drawn by such a person. Having sometime ago read a novel called "Man and Wife," and having recently perused another novel from the same eminent hand called "The Law and the Lady," in both of which there is a good deal said about Scotch law, I am firmly persuaded that the bill must have been drawn by Wilkie Collins.—I am, Sir,

F. L.

## Notes of English, American, and Colonial Cases.

**POWER OF APPOINTMENT.**—*Of life interest with power to appoint by will—Remoteness.*—A power of appointment in favour of children of the donee is well exercised by an appointment to a child, born before the power was created, of a life interest, with a power to appoint the *corpus* by will.—*Stark v. Dakyns*, 44 L. J. Ch. 205.

**POWER OF SALE.**—*Right to exercise—Consent of tenant for life—Prior term of years.*—Testator by his will devised his real estates to trustees for 1,000 years, and subject thereto in strict settlement. The trusts of the term were to pay testator's wife a life annuity of £200, and, subject thereto, for the persons entitled under the prior limitations. He also gave the trustees a power to sell the property, the power to be exercised during the life of any tenant for life, who should be for the time being entitled to the possession, or to the receipt of the rents of the estates, with his consent. The sale moneys were to be reinvested in land. By a codicil testator directed his trustees to stand possessed of the term, and of the like term to arise in the real estates which might be purchased under the trusts of the will, on trust to pay the surplus of the rents of all the said estates (after paying the interest on his mortgage and other debts) to his wife, during her widowhood in lieu of the annuity. In case she should marry again, the trust for payment of the annuity was to take the place of the trust for payment of the surplus rents. Testator's debts having been all paid,—*Held*, that the trustees could exercise the power of sale with the consent of the tenant for life, the widow also consenting.—*Robertson v. Walker*, 44 L. J. Ch. 220.

**TRADE NAME.**—*Deception of the public—Costs—Trade secret—Disclosure by confidential agent.*—A suit was instituted to restrain an alleged improper use by *defts.* of *plts.*' trade name. Both *plts.* and *defts.* were engaged in the manufacture of a compound intended for sale to brewers, and to be used by them in the making of beer in the place of hops. Upon the merits the Court decided that *plts.* had failed to make out any case for relief. But inasmuch as *defts.* as well as *plts.* were engaged in the manufacture and sale of an article which was intended to enable brewers to deceive the public :—*Held*, that the bill must be dismissed without costs. *Semble*, that a confidential agent is, in the absence of agreement to the contrary, at liberty to disclose a trade secret of his employers, after the termination of his employment, if he has acquired knowledge of the secret through an independent investigation made by himself.—*Estcourt v. The Estcourt Hop Essence Co. (Lim.)*, 44 L. J. Ch. 223.

**CARRIERS.**—*Breach of contract to carry—Damages—Measure of—Plaintiff's costs of defending an action arising out of acts of defendants.*—The *plts.* having, as carriers, contracted with H. for the carriage of certain pictures of his from London to Paris, effected a separate and independent contract with the *deflt.* railway company for the carriage of the pictures by the latter as far as Calais; and, in the course of transit from London to Calais, the pictures were, by the negligence of *deflt.*' servants, dropped into the sea at Dover and greatly injured. To recover compensation for such injury H. sued the *plts.*, claiming £1000 damages, and therefore the *plts.* gave notice to the *defts.*, and called on them to come in and defend the action, which the *defts.*, repudiating all liability, and alleging that they had a defence under the Carriers' Act, refused to do, and told the *plts.* to deal with the action as they thought proper. Accordingly the *plts.* defended the action, but unsuccessfully; and in a subsequent action by them against the *defts.*, to recover not only £650, the amount of the damage found by the jury in H.'s action to have been done to his pictures, but also the costs paid and incurred by the *plts.* in defending that action, the *defts.* paid £650 into court, and denied any further liability; and

it was held by the court below (*Bramwell and Cleasby, BB.*), on the authority of *Mors le Blanch and another v. Wilson and another* (28 L. T. Rep. N. S. 415; L. Rep. 8 C. P. 297; 42 L. J. 70, C. B.), that the plts. were entitled to recover, as damages caused by the default of the railway company, such costs of the former action as were reasonably incurred, and that such reasonableness was a question for the jury. And that, in consideration of the defts. having threatened to set up the Carriers' Act against the plts., such a defence was reasonably set up by the plts. against them, although it was untenable in law; and on appeal therefrom, it was held by the Exchequer Chamber (Lord Coleridge, C.J., and Keating, Lush, Quain, and Archibald, JJ.), reversing the decision of the court below, that such costs were not recoverable, on the ground that, inasmuch as the contract between the plts. and H., and the contract between the plts. and the defts., were entirely separate and independent contracts, the costs in question were not the natural and proximate result of defts.' default, and were not incurred by the plts. at the request, by the authority, or for the benefit of the defts.—*Mors le Blanch v. Wilson (ubi sup.)* disapproved and overruled (Lush, J., who distinguished it, *dissentiente*): (*Bazendale and others v. The London, Chatham, and Dover Railway Company*, 32 L. T. Rep. N. S. 330, Ex. Ch.)

**SALE.—Breach of Warranty.**—This action was brought upon a promissory note, which was given in payment of the purchase-price of ten tons of xx pipe iron, which plt. contracted to sell and deliver to defts., plt. agreeing that the iron should be of a quality suitable and proper for use in defts.' manufacturing business. It appeared that plt. knew what defts.' business was, and that he delivered ten tons of iron apparently of the kind and quality specified, but, in fact, of a quality unfitted and worthless for use in defts.' business. The quality of the iron was not discoverable by inspection merely, but might have been ascertained by breaking it with a sledge. The iron was received, and a portion of it used, by defts., without any previous test to ascertain its quality. Held, that plt.'s agreement as to quality was a warranty; that defts. were not bound to apply a test upon receiving the iron, and as the defect was not open and visible, defts. were entitled to counter-claim their damages on account of the breach of warranty. (*Dounce v. Dow et al.*)—Court of Appeals, N. Y.—A. L. J.

**Compounding Felony.**—The Supreme Court of Illinois have recognized the rule that, when money is paid to compound a felony, or an agreement is entered into to pay money for such a purpose, such contract is immoral and illegal. A., the son of appellant, was employed as an operator by a telegraph company in Chattanooga, in the State of Tennessee, prior to the year 1867. The officers of the company instituted a criminal prosecution against him for embezzling \$220, money of the company. By the laws of the State of Tennessee, embezzlement is made a felony. After the prosecution was commenced, on the 26th day of November 1867, appellant was, to stop the prosecution against her son, induced to execute, with her husband and another, a note for \$980, and a mortgage on the house and lot in which she and her husband lived, to an agent of the company, to secure the payment of the note. The house and lot was her sole property, derived from other sources than from her husband. There was no agreement that the son should be discharged from the claim of \$220. It was held that the note and mortgage were void.—*Henderson v. Palmer*, 7 Chicago Legal News, 293.

**APPORTIONMENT.—Of rents.—Specific devise of real estate.**—The Apportionment Act, 1870, 33 & 34 Vict. c. 35, applies to a specific devise of real estate, and generally as between the real and personal representatives, and that in a case where a will has been made before, and the testator has died after the passing of the Act.—*Hasluck v. Pedley*, 44 L. J. Rep., Ch. 143.

**STOCK.—Transfer of into joint names.—Advancement.—Survivorship.**—W. (a widow) transferred stock (previously standing in her name and that of her

deceased husband) into the names of herself, her daughter and daughter's husband. W. received the dividends on the stock during her life. The daughter predeceased W., who died, leaving her daughter's husband surviving:—*Held*, that he was entitled to the stock absolutely.—*Batstone v. Salter*, 44 L. J. Ch. 209.

**FABRICATION OF VOTING PAPER.**—*Absence of unlawful intention*—*Husband and wife*.—At an election of a member of a local board of health, the resp't. was canvassing for one of the candidates. The wife of a voter, in the absence of her husband, promised his vote, and not being able to write placed a mark on the voting paper, which was in the form prescribed by Schedule A of the Local Government Act, 1848, which requires that in the case of a voter who cannot write a witness shall attest the voter's mark and place the voter's initials against the name of the persons for whom the voter intends to vote. The resp't., believing that the wife was authorised to fill up the voting paper, and that he was not acting contrary to the Act, attested the mark made by her, describing it as the mark of the voter, and placed the voter's initials against the name of the candidate. On an information under the Local Government Act, 1858, section 13, sub-section 6, for fabricating a voting paper:—*Held*, that in the absence of an unlawful intention on the part of the resp't. he had not fabricated a voting paper within the meaning of the Act.—*Aberdare Local Board of Health v. Hammett*, 44 L. J. (M. C.) 49.

**STATUTORY POWERS.**—*Conditions of their exercise*—*Local Board*—*Nuisance*—*Public Health Act, 1848*—*Local Government Amendment Act, 1861*.—When the Legislature imposes certain conditions on a public body for the protection of the public, that body cannot break the conditions and plead in excuse that they are unnecessary for the protection of the public. The Local Government Amendment Act, 1861, gives power to a local board to make an outfall of drains beyond their district, with a proviso that nothing therein contained shall authorise them to pour any noxious matter into any stream. On an information to restrain a local board from pouring noxious matter into a stream through an outfall beyond their district, the local board tendered evidence to show that no damage was caused to any one thereby:—*Held*, that this was immaterial and an injunction a matter of course.—*Workington Local Board v. Cockermouth Local Board*; and *Attorney-General v. Cockermouth Local Board*, 44 L. J. Rep. Ch. 118.

**NUISANCE.**—*Coke ovens*—*Smoke and deleterious vapours*—*Nature and extent of damage necessary to sustain suit*.—A plt. seeking to interfere on the ground of nuisance with a work carried on in a normal manner must, in order to sustain his suit, show that he has incurred actual and substantial or "visible" damage. The primary evidence of such damage should be that of ordinary witnesses. Scientific evidence should be resorted to, not to establish the fact of the damage, but only to explain the causes of it. The Court will not in such cases send an expert to report where such course would in fact be giving a new trial on new evidence, and delegating the judgment of the Court to that of the expert, nor will it direct an issue where the state of things may have been materially altered from lapse of time since the institution of the suit.—*Salvin v. The North Brancefeth Coal Co.*, 44 L. J. Rep. Ch. 149.

**GAMING.**—*"Place" within Betting Houses Act*—*Permitting cricket ground to be "used" for betting*.—A ground used for cricket, foot-racing, etc., is a place within the meaning of the 16 & 17 Vict. c. 119, s. 1, and the owner, occupier or keeper may be convicted under the Act for knowingly permitting any other person to use any such house, office or place for the purpose of betting with persons resorting to it, though the person so using it is in no sense the occupier or keeper of the premises.—*Haigh v. Corporation of Sheffield*, 44 L. J. Rep. (Mag. Cases) 17.

**WILL.**—*Power given to advance an adult*—*Payment of his debts*.—Testator bequeathed a legacy to trustees upon trust to pay the income to A. B. for his life, and

after his death for such trusts as he should by his will appoint, and in default of appointment in trust for his children. And he declared that his trustees might, at any time during the life of A. B., apply any part of the trust-fund not exceeding a moiety, for the preferment or advancement of A. B., or otherwise for his benefit. A. B. was thirty years of age at the date of the will. After the testator's death he borrowed considerable sums of money on the security of his life interest in the fund, and being unable to pay off these debts, requested the trustees to pay them off under the power above mentioned. On a bill being filed to restrain the trustees from so doing,—*Held*, that the words of the power authorised the trustees to pay off the debts.—*Lowther v. Bentinck*, 44 L. J. Ch. 197.

**WILL.**—*Bequest of railway shares.*—A bequest of the testator's shares in a railway will carry his railway stock.—*Oakes v. Oakes* (9 Hare, 666) overruled. *Morrice v. Aylmer*, 212.

**UNDUE INFLUENCE.**—*Voidable transaction—Confirmation—Delay.*—An act cannot be relied on as a confirmation unless the voidable nature of the original transaction was known to the confirming party. A girl, under age, gave a promissory note as surety for her stepfather. Soon after coming of age she executed, under his influence, and without receiving any independent advice (as the obligee knew), but with knowledge of the invalidity of the promissory note, a bond to secure payment of the same debt six years after date. Shortly after the expiration of the period of six years, and at the age of twenty-nine, she executed another bond to secure the same debt, under threat of legal proceedings. She was afterwards sued on this bond, and thereupon filed a bill to avoid the bonds, and to restrain the action. *Held*, that she was entitled to the relief prayed. The bill was not filed till nearly seven years after the last bond was executed; but in the interval nothing had been done by the creditor, until immediately before the bill was filed. *Held*, that the plaintiff was not debarred by delay.—*Kempson v. Ashlee*, 44 L. J. Ch., 195.

**MARRIAGE.**—*Cohabitation.*—On a question of marriage, constancy of dwelling together is the chief element of cohabitation. Cohabitation is not a sojourn, a habit of visiting, nor a remaining with for some time. Cohabitation and reputation are not marriage, but when conjoined they are evidence from which a presumption of marriage arises. Cohabitation is to have the same habitation, so that where one dwells there the other dwells with him. Without concomitant facts to prove marriage, an irregular cohabitation and partial reputation is of no avail in the proof of marriage.—*Yardley's Estate*, 75 Pennsylvania Reports, 207.

**TRUST.**—*Uncertainty—Advancement of Christian religion.*—A testator provided in his will that the residue of his estate, which consisted of personal property, after paying legacies, should be retained by his executor and invested by him during the life of his wife for her use, and that at her death it should be appropriated by the executor to the advancement of the Christian religion, and be applied in such manner as, in his judgment, would best promote the object named. The executor accepted the trust; and during his life and that of the widow, the heir brought suit to annul the will for uncertainty as to the object of the trust. *Held*, that the testator had conferred ample power upon the executor to relieve the bequest of all objections arising from its indefinite character, and that so long as no obstacle exists to the exercise of the power at the proper time, the courts of this State will not, in advance of that time, interpose, on the application of the heir, to prevent its exercise.—*Miller v. Teachout*, 24 Ohio St. 525.

**LIBEL.**—*Restraint of publication—Jurisdiction.*—The Court of Chancery has no jurisdiction to restrain the publication of a libel, even when its publication will be injurious to property or reputation.—*Dicta of Malins, V.C.*, in *Dixon v. Holden* (Law Rep. 7 Eq. 492) disapproved. *The Prudential Assur. Co. v. Knott*, 44 L. J. (Ch.) 192.

**PATENT.—Particulars of infringement.**—Where a simple article, alleged to be an infringement, was made an exhibit, the Court refused to order further particulars as to what part of the specification was infringed.—*Bateley v. Kynoch*, 44 L. J. (Ch.) 219.

**PATENT.—Particulars of breaches and of prior user.**—The practice in equity in regard to patent suits must conform, as far as possible, to the practice at law as established by statute (15 & 16 Vict. c. 83, s. 41). Therefore, the plt. in a patent suit ought to deliver to the defts. particulars of the breaches whereon he means to rely, and having done so, is entitled to discovery from a deft. setting up the defence of prior user of particulars of such prior user.—*Finnegan v. James*, 185.

**HUSBAND AND WIFE.—Damages for libel—Right of wife deserted to sue alone.**—A woman who has been deserted by her husband, and has obtained an order, under 20 & 21 Vict. c. 85, s. 21, for the protection of her money and property from her husband and his creditors, may maintain an action for a libel without joining her husband.—*Ramsden v. Brearley*, 44 L. J., Q. B. 46.

**WATER AND WATERCOURSE.—Artificial stream—Overflow.**—The defts., owners of a canal, being threatened by an overflow of flood water from a neighbouring river, and fearing damage to their premises situated on the banks of the canal, placed across it, at a point above their premises, planks reaching from the bottom of the canal to the coping stone, which was some inches higher than the surface of the canal water. The flood water afterward broke into the canal at a point above the barricade of planks, and opposite to the plt.'s premises, which were also situated on the banks of the canal above the premises of the defts., and, being penned back by the planks, the water rose in the canal until it flooded the plt.'s premises. In an action brought to recover damages for the injury so caused; *held*, that the defts. were not liable, on the ground that the water which did the mischief was not brought there by them, and that there is no duty on the owners of a canal analogous to that on the owners of a natural watercourse, not to impede the flow of water down it.—*Neild v. London and North-Western Railway Company*, L. R., 10, Ex. 4.

**SEAWORTHINESS.—Marine insurance—Deck cargo.**—The warranty of seaworthiness implied in a contract of marine insurance is a warranty that the ship is seaworthy for the purposes of the particular subject-matter of the insurance. Therefore, in the case of a policy of insurance on deck cargo, it is not a compliance with the warranty of seaworthiness that the ship is fit to encounter ordinary rough weather with safety to herself because the deck cargo is such as may be readily jettisoned in such weather.—*Daniels v. Harris*, L. R. 10, C. P. 1.

**TRESPASS.—Animal, owner liable for trespass of—Negligence.**—The defts.' horse having injured the plt.'s mare by biting and kicking her through the fence separating the plt.'s land from the defts.'; *held*, that there was a trespass by the act of the defts.' horse, for which the defts. were liable, apart from any question of negligence on the part of the defts.—*Ellis v. The Loftus Iron Company*, L. R. 10, C. P. 10.

**SALE OF GOODS.—Contract to deliver goods by monthly instalments—Insolvency of vendee—Rescission of contract.**—In the beginning of February 1872, plt. agreed to buy and the defendants agreed to sell 200 tons of iron, to be forwarded in quantities of twenty-five tons per month, the first delivery to be in April. At the time of making the contract plt. were insolvent, and upon the 15th of March they determined to suspend payment. They forthwith informed defts. of their insolvency. Upon the 5th of April there was a meeting of plt.'s creditors; the contract with defts. was not mentioned in their written statement of affairs. The iron was not forwarded by defts. in April or the early part of May, nor did plt. require it to be delivered, nor did they offer payment for it. Pts.' creditors ultimately accepted a composition of 5s. in the pound.

Plts. took new partners; and on the 13th of May they called upon defts. to supply iron according to the contract of the preceding February; defts. forthwith repudiated liability to fulfil the contract. Plts. having sued for breach of the contract:—*Held*, that there was evidence upon which a jury might find that the contract had been rescinded, and could not be enforced upon the 13th of May.—*Morgan v. Bain*, 44 L. J. Rep., C. P. 47.

**THEATRE.**—*Right of renter to free admission—Usual audience part—Stalls.*—Stalls are part of “the usual audience part of the theatre,” and any renter has a right of free admission to a seat in such stalls which is unoccupied and not pre-engaged when he arrives there, and he does not lose such right because he has used his privilege of free admission by going in the first instance into the dress-circle, and consequently he has a right to change from the dress-circle to the stalls without being required to pay the difference in price between a seat in the dress-circle and in the stalls, and which is paid by any of the public on so changing from the dress-circle to the stalls. Per Lord Coleridge, C.J., and Brett, J., the right of such renter being limited to the time between the opening of the doors of the theatre to the admittance of the public and the termination of the performance, and being also subject to the said regulations for the management of the theatre, such renter cannot go into any seat which has been pre-engaged, although it may not be occupied when he arrives; nor can he go into any private box, because by the regulations a seat cannot be taken in a private box, but the whole box must be taken.—*Dauney v. Chatterton*, 44 L. J. Rep., C. P., 53.

## The Scottish Law Magazine and Sheriff Court Reporter.

### SHERIFF SMALL DEBT COURT—PERTH.

Sheriff BARCLAY.

*Meall's Executors v. Wedderspoon.*

**Local Assessments—Liabilities of outgoing and incoming tenants.**—In this case the pursuers—the executors of the late James Meall—were the outgoing tenants of the farm of Buttergask, parish of Cargill, and the defender, William T. Wedderspoon, was the incoming tenant of the farm, and the question in dispute was as to their respective liabilities for poor-rates and other local assessments for the year in which the one left and the other entered. The following note, issued by his Lordship, explains the case:—

“This is a claim for £5, 13s. 9d. on the following statement:—‘To half of the following rates, paid by the the complainers the outgoing tenants at Martinmas last from the farm of Buttergask, for the year from Whitsunday 1874 to Whitsunday 1875, and for which the defr. is liable as the incoming tenant to said farm at the said term of Martinmas, viz. :—

Poor-rates on a rental of £475, at 4d. per £,	£7 18 4
School rate on a rental of £475, at 1½d. per £,	2 19 4½
Registration rate on a rental of £475, at ½d. per £,	0 9 10½
	<hr/>
	£11 7 7
	<hr/>
Half whereof payable by defender,	£5 13 9

The pursuers are outgoing tenants, and the defr. incoming tenant, of the farm of Buttergask. The deceased James Meall had for a very long series of years been the tenant. His tenancy commenced before the enactment of the new

Poor Law in 1854. In 1855 he renounced an existing lease, and received a new one for nineteen years, reckoning from Martinmas 1854. The rent was made payable in equal moieties at Candlemas and Lammas for the '*crop and year*' previous. The landlord or incoming tenant was to take one-half of the grain crop and the whole of the green crop at valuation. The defr. in his turn entered on a nineteen years' lease of the same farm, entering at Martinmas 1874, and was taken bound, in accordance with the previous lease, to take and pay for the half of the grain crop and the whole of turnip crop of 1874. His rent was payable in equal portions at Martinmas and Whitsunday for the crop of the previous year. The poor-rates for the parish of Cargill were on 12th October 1874 imposed for the year from Whitsunday 1874 to Whitsunday 1875. The pursuers were then on the valuation roll as tenants and occupants of the farm, and so undoubtedly were in the first instance the proper parties to be assessed. After some demur they paid for the whole year, and now sue the defr. for relief of one-half, applicable to the half-year after Martinmas 1874, when the pursuers ceased to occupy and the defr. succeeded in the occupancy. The question is whether a tenant who, like the pursuers, is assessed, and who reaps the crop, and is therefore the more beneficial occupant, should pay the whole, or whether he should recover one-half from an incoming tenant, like the defr., who enters after the reaping of the crop and possesses only during the least remunerative period of winter? If the question were to be solved on mere considerations of expediency, there is much which can be said on both sides. Against the equal division by time and in favour of the outgoing tenant paying the whole burdens for the year there is the argument of simplicity. The rent being '*for crop and year*,' the tenant paying the whole has the crop as the chief source of revenue. The successive tenants are thus not brought into contact, though such is impossible altogether to avoid in other and more important matters, as in this case the taking of crop on valuation. The successive rents are generally different in amount, and the extent of the possession is not unfrequently changed, and, as in this very case, the terms of payment are also made subject to alteration, so that the equal division of the assessments may not fall equally on the rents. On the other hand, where a tenant enters without paying for his half, he has his equivalent burden when he in his turn leaves, and thus an adjustment is eventually made. But then there may be a change of tenancy on one or both sides, and, as is the case in this instance, the pursuers' predecessor, having entered before the assessing statute, could not have received the corresponding advantage at their entry. Then, though undoubtedly the crop is reaped by the outgoing tenant, yet the incoming tenant has the grass and seed bed for the winter and spring. Now that pasturage is prevailing over cropping, it has become more an available source of revenue. Therefore, in the view of expediency and equity, there is much of advantage for adjusting the allocation of time and occupation instead of the principle of lucrative possession.

"The S.-S. was at first of opinion that by a train of decisions in this Court he had adopted the rule of beneficial possession. He felt, therefore, reluctant to introduce a new rule of decision. He has inquired, and can find notes only of three cases where he was called on to determine the question. In a case in 1849 it was statute labour assessment which was at issue. That assessment was from 1st July to same date in each assessive year, and the S.-S., after deliberation, held that the tenant who entered at Whitsunday was liable for the whole assessment for that year. In another case in 1852, and nearly identical with the present, the S.-S. advised with Sheriff Crawford, and the newspaper report states that the Sheriff had consulted the officials of the Board of Supervision, and that their opinion was that the reaping of the crop ruled the liability. But the outgoing tenant stated that the farm was chiefly a grazing farm, and that the incoming tenant had the beneficial possession to that extent for the half-year for which relief was claimed; on this a remit was made to a practical farmer, and, on his report, an allocation of the assessment was made according to the relative



benefits received. The third and more recent case was in August 1870, which arose from assessment of road money and income-tax. The S.-S. in that case adopted the division of time, and not by crop (*Journal of Jurisprudence*, vol. xiv. p. 580). On inquiry the S.-S. finds that the practice as to allocation of the assessment is different in different parts of this country. In a late case in Aberdeenshire the same question arose. Sheriff Comrie Thomson (*Journal of Jurisprudence*, February 1875) with difficulty decided for placing the whole of the year's assessment on the tenant who entered at *Whitsunday*, though the outgoing tenant reaped the crop of that year. But there the incoming tenant entered at *Whitsunday*, being bound to take the whole crop at a valuation. In the present case the term of removal and entry is Martinmas, not *Whitsunday*, and the incoming tenant was bound to take only the half of the crop at valuation. On inquiry at Fife the S.-S. learns that there diversity of opinion and practice exists, and that the prevailing practice is for a division. In Forfarshire, again, he learns that though there also is a diversity of opinion, the practice is for the outgoing tenant who reaps the crop bearing the whole assessment for that year. The S.-S. has, therefore, considered the point more in its legal than equitable aspect. In the first place, it is to be recollected that the Apportionment Act introduced from England is in favour of a decision in all cases according to exact time, rather than by the currency of fixed terms of reaping crops. Then there is the express statute on the point (32 & 33 Vict. c. 41, 1869) which expressly introduces division according to time of occupation between outgoing and incoming tenants as to the allocation of poor rates. Though the statute be an English Act, there appears no reason why its principle should not find place in Scotland. See English case under this statute, 2nd June 1869, Queen's Bench Magistrates Cases, 72. The Court held 'an outgoing tenant liable *de die in diem* up to the moment of the new tenant coming in.' In the *Poor Law Magazine*, vol. ix. p. 463, there is given a decided opinion by the Secretary of the Board of Supervision, which may be taken as the opinion of his Board. The question was precisely that now before the Court, and the official answer was that 'in equity the burden of maintaining the poor during any year or *half-year* naturally falls upon those who are owners and tenants in the parish during that year or *half-year*.' On the whole, the S.-S. is now of opinion as a general rule, and where there exists no speciality arising from contract or practice, that equal division of assessment is the legal and proper rule to be adopted, and therefore that the pursuers in this case should prevail. Therefore decerns, but without costs. HUGH BARCLAY."

#### SHERIFF COURT OF LANARKSHIRE.

Sheriffs DICKSON and GALBRAITH.

ORR, EWING, AND CO. v. BOARD OF POLICE OF GLASGOW.—July 21, 1874,  
March 15, 1875.

*Corporation—Reparation—Public corporate body liable in damages occasioned to a private person by negligence of their servants—Such negligence inferred from the facts without proof of the specific culpa.*—The facts of this case sufficiently appear from the interlocutors:—

"Glasgow, July 29, 1874.—Having heard parties' procurators, and made avizandum; Finds that this action is raised for the sum of £1000 as loss sustained by pursuers through defenders' negligence in failing to keep the sewage and water flowing through the drain in West Nile Street, adjoining the pursuers' warehouse, in proper order, and that the liability for the said damage is sought to be cast upon the defrs. because of their property in said street, and drain, and of its defective construction: Finds it proved that, on the 9th and 10th September 1872, the pursuers' premises were flooded with filthy sewage from the said drain having burst, and that the goods in their premises were thereby destroyed to at least the amount of £745, 7s. 4d., as per

statement, 8-2 : Finds that this sewer has been in charge of the Police Commissioners, the defra. here, or their predecessors, since before the witness Carrick was appointed city architect, more than thirty years ago : Finds that no plans of the sewers of that street in the city, except such as are shown on the Ordnance map, No. 8-4 of process, and which are mere surface tracings of the line of the sewer, have been in existence at any time within the thirty years, if they were ever made : Finds that Mr. Carrick states that no alteration was made upon that sewer from the time of his appointment, although a large additional sewage was turned into it from the upper quarters of the town : Finds that about twelve or fifteen years ago an additional channel was provided for the passage of sewage to the south of Gordon Street : Finds, from the evidence of Professor Grant, that at the time the sewer burst there was an extra rainfall, and that therefore the sewer would be under unusual pressure : Finds in law, and under reference to the annexed note, that the defra. are responsible for the bursting of the sewer and the consequent damage to the pursuers : Therefore decerns against the defenders for the sum of £745, 7s. 4d. sterling : Finds the defra. liable in expenses : Allows an account thereof to be given in, and remits the same when lodged to the Auditor of Court to tax and report.

JAMES GALBRAITH.

"*Note.*—There is no doubt that the sewer burst opposite the pursuers' premises and did the damage for which reparation is now sought, and the questions in law raised by the defra. are these :—(1) Did the Police Commissioners warrant the safety of the sewer? and (2) If they did, have they explained from any extraordinary occurrence the cause of the bursting? and again, (3) Have the pursuers proved that the bursting of the sewer arose from defra. neglect? No doubt the pursuers aver negligence on the part of the defra., and must therefore be held bound to prove it, the burden being on them. The Sheriff-substitute thinks that the pursuers have done so. For more than thirty years a small sewer, suitable for the purposes of the district at that day, ran down West Nile Street, on the property, or at all events on the street held in trust by the defra., or their predecessors, and it was clearly their duty to see that, as the exigencies of the town might require greater accommodation, that sewer as well as others should be kept sufficiently large. But it appears from Mr. Carrick's own statement that for more than thirty years the defra. have had no plans, and seem to have known nothing specially about the size of the sewer, except that occasionally a servant went into a manhole for the purpose of cleaning it; and it appears also from Mr. Carrick's evidence, as already stated, that a considerable area of extra sewage was drafted into that sewer. As to the legal liability of the defra. there is no doubt, if they have been in error. The case of the Mersey Docks, decided in the House of Lords in 1868, puts an end to that question. Public companies and public trusts must so deal with the subjects held in trust, as not to injure their neighbours, and the very holding of a town trust implies an obligation of correct supervision and careful use. It may seem hard that innocent ratepayers require to bear the costs of the neglect of public officials, but it is not quite so hard, as to find that an equally innocent adjoining proprietor should have goods destroyed to such an extent as in this case, or to any extent whatever, from the neglect of those who undertake public duties.

J. G."

This judgment, having been appealed, was adhered to by the Sheriff Principal in the following interlocutor :—

"*Glasgow, 15th March 1875.*—Having heard parties' procurators on the defra.' appeal and considered the record and proof : Adheres to the findings in fact in the interlocutor appealed against : Finds further in fact that the sewer in question burst from having been either defective in construction or out of repair : Finds it not proved that the bursting thereof was a *damnum fatale* : Therefore adheres to the interlocutor *quoad ultra*, and decerns.

W. G. DICKSON.

"*Note.*—The Sheriff has experienced much difficulty and doubt in this case.

"As the defra. carry on their operations, not for their personal advantage, but

in the exercise of statutory powers, and in the interest of the public, they are not responsible to the pursuers for the damage in question, unless it arose from *culpa* on the part of their servants. They are distinguished in this respect from private persons carrying on similar operations in their own interest and without statutory authority, who are liable to persons injured by these operations, although negligence be not proved against them. See the cases, *Mersey Dock Trustees v. Gibb*, 1866, 1 Law Repts. H. of L., English and Irish Appeals, 93; *Pirie v. Magistrates of Aberdeen*, 1871, 9 Macph. 412; *Blyth v. Birmingham Water Works Co.*, 1856, 11 Welsley and Hurlet, p. 781; *Madras Railway Co. v. Zemindar of Carvetinagarum*, Privy Council, *Times* of 6th July 1874; compared with *Rylands v. Fletcher*, 3 Law Repts. H. of L., English and Irish Appeals, 330; *Kerr v. Earl of Orkney*, 1857, 20 D. 298.

"Assuming, then, that the pursuers must prove negligence or other *culpa* on the part of the defra' servants, it does not follow that they must prove exactly the cause of the accident and the kind of *culpa* which occasioned it. Upon these there may be much room for difference in opinion; while it may be clear that the accident could not have happened if the defra' employes had taken reasonable and proper care. Accordingly, while the pursuers must bear the burden of proving *culpa* in the first instance, they will discharge themselves of that burden, and shift the burden of proof on to the defra, if they prove circumstances from which *culpa* may reasonably be presumed.

"This principle is well-illustrated by the remarks of Lord Fullarton in the case of *M'Anlay v. Buist*, 1846, 9 D. 245, which was an action of damages on account of injuries sustained through badness or negligent working of machinery at a coal-pit. His Lordship said (p. 247), 'I cannot adopt the principle which was evidently assumed in the able argument on the part of the defra, viz. that the verdict must be held to be against evidence, unless the pursuer proved the specific defect of the machine or specific neglect of the defra. which occasioned the accident; . . .' (p. 248) 'I think that in every analogous case the fair inference of defect in the machine, or neglect, must arise from the very fact of the accident itself. There is an operation, viz. going down a coal-pit, which is performed with perfect safety by thousands of persons every morning, in which accidents of this kind happen in general entirely from the defects of the machinery. Is not a jury fairly entitled to hold, on a question of fact, that such was the case here? And what is the answer of the defra.? That it may have arisen from some *damnum fatale*, some unaccountable failure of the machine, against which no human foresight could guard. This, no doubt, is possible, but is it to be presumed contrary to universal experience? And is it not the business of the party who offers the explanation to prove it, by showing that all the ordinary precautions were taken in the erection or construction of the machinery?'

"The same principle is brought out in the English case *Kearney v. London & Brighton Railway Co.*, 1870, 5 Law Reports, Q. B. 411, Affd. 6 L. R. Exch. Ch. 759, which was an action against a railway company on account of damage caused by a brick having fallen from one of the company's bridges. It was there held that the falling of the brick was *prima facie* evidence, from which the jury might infer negligence in the defra. Lord Chief Justice Cockburn observed, 'The company were bound to construct the bridge in a proper manner. I think the brick being loose affords *prima facie* a presumption that they had not used reasonable care and diligence. . . . Where it is the duty of persons to do their best to keep premises or a structure, of whatever kind it may be, in a proper condition, and we find it out of condition, and an accident happens therefrom, it is incumbent upon them to show that they used that reasonable care and diligence, which they were bound to use, and the absence of which, it seems to me, may fairly be presumed from the fact that there was the defect from which the accident has arisen.'

"On appeal, the Lord Chief Baron Kelly adopted the Lord Chief Justice's opinion, saying his Lordship 'in his judgment in the Court below said *res ipsa loquitur*; and I cannot do better than refer to that judgment.'

"It may be observed that, in the case of *Kearney v. London and Brighton Railway Co.*, the defts. were a company carrying on their operations under statutory authority. Accordingly, the action (as here) was laid on negligence of their servants.

"In applying these principles to the facts of this case, the first thing that strikes one is that the immediate cause of the bursting of the sewer has not been properly ascertained. The witness White considers that it arose from a 'manhole' having fallen in and stopped the flow of water in the sewer, and he 'has no doubt' that it was the heavy rains going through the sewer that brought down the manhole. It also appears that the bottom of the sewer had given way (Carruther's evidence); but whether it did so before or after the manhole fell in, or how the heavy rains operated on either of them, is not explained. Mr. White is of opinion that the sewer 'was large enough to discharge twenty times as much water as flows through it.' But this evidence is inconsistent with the fact that it burst during a flow of water which (even according to the defts.' argument) was only about five times the usual quantity. It follows that if White is right in saying that the sewer was sufficient in point of capacity for such an extra flow, it must have been deficient either in construction or repair.

"Farther, as the S.-S. observes, since the sewer was constructed there has been a great increase in the population, and in the number of manufacturing in the district which it drains, and consequently in the quantity of water running through it; yet it does not appear to have been examined with reference either to the altered state of things or to its state of repair. That it was in good repair is a mere assumption, without any foundation in the facts proved; the natural inference from which is that it was not so.

"There is no evidence that the 'usual precautions' were taken to secure the fitness of the sewer for its increased work, or to secure its good condition (see per Lord Fullarton, *supra*); while the want of evidence of its having been inspected is a material circumstance against the defts. (see per Lord Chief Justice Cockburn in *Kearney v. London and Brighton Railway, supra*). In such a state of matters the defts.' employes must be held to have run the risk of the structure being in good repair, instead of ascertaining that it was so. Such a course of conduct was culpable.

"The defts.' attempt to account for the accident by an unusual rainfall is unsatisfactory. Professor Grant's evidence shows, no doubt, that the rainfall in the first ten days of September was nearly five times greater than the average throughout the year; but it does not show that as great, or even greater rainfalls had not occurred repeatedly in previous years,—that they are not quite common, or that during the two or three days before the accident the fall had been so extraordinary as to have caused the bursting of well-made sewers. On the contrary, while the rainfall was highest on the 4th, it diminished considerably on the 5th and 6th, rising on the 7th, but only to less than half what it had been on the 4th, and diminishing again on the 8th, 9th and 10th, the two last being the days on which the pursuer's goods were damaged. The sewer was thus not burst during the greatest flow of water in it, but after the waters had greatly subsided; and it is not proved—nor is it to be presumed—that it was so damaged during the heaviest flow, that the subsequent slighter flow burst it. It is not inconsistent with the real evidence to hold that it was becoming more and more out of repair for a considerable time before the accident, and that it would have burst had there been no heavy rains at the time.

"The case is not like that of a reservoir where the water accumulates during successive days of heavy rain till at last it causes a burst or an overflow; for sewers should be sufficient to carry off the rainfall without any accumulation.

"The defts.' argument based on the sewer being sufficient for the ordinary rainfall is fallacious. Sewers must be fit to carry away far more than mere ordinary quantities of water. Although they need not be large enough for

such rainfalls as may be counted among 'nature's miracles' (see per Lord Cockburn in *Samuel v. Edinburgh and Glasgow Railway Co.*, 1850, 13 D. 312; and per Lord Benholme in *Pirie v. Magistrates of Aberdeen*, 1871, 9 Macph. 412), they should suffice for 'such floods as don't happen above once or twice in a century' (per Lord Gifford in the case last noticed), because an extraordinary fall of rain is a matter which in our climate cannot be called a '*damnum fatale*' (per Lord Justice Clerk Hope in *Kerr v. Earl of Orkney*).

"The rainfall having thus not been so excessive as in itself to account for the accident, or so great that the sewer can be held good and sufficient, although unable to carry it off; and there being no proof that the sewer was in good condition or repair, the fair inference is that the accident arose from its having been insufficient either in construction or in repair, for a rainfall which it ought to have carried off safely. That is to be presumed from the known facts as to the accident, upon the principle *res ipsa loquitur*."

"The case of *Blyth v. Birmingham Water Works*, on which the defra. found, does not throw light on the present case; for there it was proved that the accident which caused damage to the plt. by water from the defra.' pipes had arisen from the effect of ice on a fire-plug at one of the pipes during 'one of the severest frosts on record.' The county court judge, before whom the case had been tried, left it to the jury to say whether the defra. ought to have removed the ice, upon which a verdict was returned for the plt. It was held on appeal that there had not been sufficient evidence to go to the jury. There, it will be seen, the cause of the accident had been clearly ascertained; and the question was whether there was negligence in the defra. not having provided against it. Baron Alderson's remarks, on which the defra. found, that 'a reasonable man would act with reference to the average circumstances of the temperature in ordinary years,' could not have been intended to mean that it is enough to provide for such average cases; for circumstances above average constantly occur, which must be provided for. His Lordship's real meaning appears from his saying, 'such a state of circumstances (viz., a frost "which penetrated deeper than any which ordinarily occurs south of the polar regions") constitutes a contingency against which no reasonable man can provide.'

"In the present case it is a mere assumption that the accident was attributable to the quantity of water in the drain; and it is not proved that there was a quantity so unusual that 'no reasonable man' could have been expected to provide against it.

"If the accident is to be attributed to the insufficient state of the sewer, which it was the defra.' duty to have had in a sufficient state, it will not do for them to say that they did not know of the insufficiency. As they had the means of knowing, it was their duty to have known of it.

"In the English case of the *Mersey Dock Trs. v. Gibb*, *supra*, where the claim was on account of damage to vessels from a mud bank, the Lord Chief Baron charged the jury that if in their opinion 'the cause of the misfortune was a bank of mud, and the defra., by their servants, had the means of knowing the state of the dock, and were negligently ignorant of it, then, in his opinion, the defra. were liable;' and this was sustained on exception as a correct ruling. If the law were otherwise, it would encourage negligence, since those responsible for keeping the sewers (or whatever else was in question) in good condition would escape the consequences of their not being so, by pleading ignorance of their state, which in itself infers negligence.

"Looking to the Mersey Dock case above noticed, there is no doubt (and the defra.' procurator did not dispute) that if neglect is established against the defra., they are liable in their corporate capacity for the consequences by way of damages.

"The amount of damage sustained by the pursuers on the occasion is sufficiently proved, and was not disputed by the defra.' procurator. W. G. D."

The defra. have acquiesced in this judgment.

## SHERIFF COURT OF ARGYLESIRE.

Sheriffs SIR GEORGE HOME and IRVINE.

ARGYLE AND BUTE LUNACY BOARD v. ANDREW MAIR.—October 17, 1874,  
March 23, 1875.

*Title to pursue—Corporation.*—William Mair, farm manager at Fernoch to the Argyle and Bute District Asylum, Lochgilphead, was dismissed by the medical superintendent, and this action of removal from the house he occupied on the farm was raised against him at the instance of 'the Argyle District Board of Lunacy, and Archibald MacEwan, writer and banker, Lochgilphead, secretary, and for behoof of the said Argyle District Board of Lunacy and the Bute District Board of Lunacy, and John Wilson, town-clerk of Rothesay, secretary, and for behoof of the said Bute District Board of Lunacy, principal tenants of the subjects after specified, with consent and concurrence of James Rutherford, M.D., residing at Tinalinn, near Lochgilphead, now or recently medical superintendent of the said District Lunacy Board, for any right or interest he has in the premises. The following interlocutors of the S.-S. and Sheriff sufficiently explain the defr.'s preliminary plea of 'no title to pursue' which was sustained by the Sheriff:—

*Inveraray, October 17, 1874.*—The S.-S. having heard parties' procurators and made avizandum: Finds that the defr. has failed instantly to verify a defence excluding the action, and therefore ordains him to find caution for violent profits within six days, under certification.  
GEORGE HOME.

*Note.*—The first preliminary defence is that the Argyle and Bute District Boards of Lunacy are not corporations, have no statutory existence, and are not empowered to sue or authorise their secretaries to sue.

"If this defence is to be sustained it would at once exclude the action. It does not however appear to the S.-S. to be a good one. It is not disputed, so far as he understands, that both of these Boards are public bodies, constituted, if not by, at least under the Act 20 & 21 Vict. cap. 71, and as neither that nor any subsequent Act appoints any mode by which they may sue or be sued, it would appear that they are entitled to sue by the names by which they are distinguished (MacGlashan, s. 649, Barclay's edition).

"The plea that the Argyle district being the last county left in the Stirling district under the Act, should therefore be called the Stirling district, is of a very technical nature, and the S.-S. is not disposed to give it any weight. The Board has always been known as the Argyle District Lunacy Board, and it would surely be absurd to require a separate county board to call itself by the name of another county, which for anything that appears may have a board of its own under precisely the same name.

"The second preliminary defence seems to the S.-S. without any foundation, as he is not aware of any reason whatever against raising a summons of removal before the term.

"As regards the defences on the merits, they are both matters of proof, and as they therefore cannot be held to have been instantly verified, it is unnecessary to consider them further at present.  
G. H."

The case was appealed to the Sheriff, by whom the following interlocutor was pronounced:—

*Edinburgh, 23rd March 1875.*—The Sheriff having heard parties' procurators on the defr.'s appeal against the interlocutor of 17th October last, and considered the record, productions, and whole process, Recals the interlocutor appealed against: Sustains the first plea in law for the defr.: Finds the action irrelevant as laid, and therefore dismisses the same: Finds the pursuers liable in expenses, and decerns.  
ALEX. F. IRVINE.

*Note.*—In terms of the Lunacy Act, 20 & 21 Vict. c. 71, district boards

are elected out of the commissioners of supply, and magistrates of burghs by the county prison boards, which in turn are nominated by the commissioners of supply and magistrates of certain burghs, as directed by the Prisons (Scotland) Administration Act, 1860, 23 & 24 Vict. c. 105, s. 11.

"In no statute is there any constitution of these district boards as corporations. There is no incorporating clause, nor is there any provision authorising these bodies to sue or defend in their aggregate capacity, or giving power to any of their officers to appear on their behalf. Under these circumstances it seems clear, under a long series of decisions, that these boards are not entitled to assume a privilege conferred only by King's patent, or by Act of Parliament, but must come into court in the ordinary way. Every action in a court of justice must proceed either at the instance of individuals who can qualify a proper title and interest to carry on the action, or at the instance of a body corporate which has a name known and recognised in law. The Argyle and Bute District Lunacy Board is not an incorporation, and has no *nomen juris*. It has indeed no more title to sue in its own name than the commissioner of police of a burgh, the kirk-session of a parish, or an ordinary unincorporate company, none of which are entitled to this privilege. *Tannoch v. Reid*, May 24, 1829, 7 S. 607; *Kirk-Session of North Berwick v. Syme*, Nov. 14, 1839, 2 D. 23; *Culcreagh Cotton Company v. Mathie* Nov. 27, 1822, 2 S. 47; *Decey on Parties to an Action*, 148-162.

"Nor does the introduction in the present case of the names of the secretaries meet the objection. Strictly speaking, there is no mention in the Act of any such officer. By section 68 power is given to appoint a clerk, but, as already said, no authority is given to him to represent the Board or to raise or defend any action on its behalf. This being so, the Board must itself show a *locus standi* before its officers can have any title. If the leading instance is bad, the clerk or secretary has no *persona* to make a sufficient instance, his existence being merely relative to that of his constituent. *Kerr v. Clyde Shipping Company*, June 8, 1839, D, 901. The defence must therefore be sustained.

"A. F. I."

## SHERIFF COURT OF RENFREWSHIRE.

Sheriffs SMITH and FRASER.

MRS. ELIZABETH MUIR OR M'LAULAY v. PETER M'LAULAY.—Jan. 30, 1875.

*Husband and Wife—Aliment—Savitia.*—The law and the facts appear from the following interlocutors. The very important question here raised is not settled in any way by the new Sheriff Court Bill. We are informed that the Sheriff of Lanarkshire and his Substitutes have many of these cases every year, and have decided them differently from the Sheriff of Renfrew.

The action was raised in the Sheriff Court at Greenock by a wife against her husband, concluding for interim aliment till the rights of parties were put upon a permanent footing by decree of a competent court. The ground of action was *savitia* which compelled her to leave her husband's house. The defence was a denial of *savitia*, and an offer to receive the wife back to her home, and to treat her kindly, as he (the husband) averred he had always done. The question started at the outset was this, whether it was competent to allow a proof of the *savitia* in order to award interim aliment. The Sheriff-Substitute pronounced this interlocutor:—

"The S.-S. having heard parties' procurators: Finds the defr.'s offer to take the pursuer back to be a sufficient offer."

To this interlocutor the S.-S. added the following

"*Note.*—To allow a proof of the alleged brutal usage of the wife by her husband, in the face of the husband's offer to take her back, would be, in the opinion of the S.-S., to attempt to usurp the jurisdiction of the Court of Session. If the pursuer's statements are true, she has her remedy there."

On appeal the Sheriff adhered, and remitted the cause to the S.-S., to be further proceeded with. The Sheriff added the following note, explanatory of his judgment :—

*Note.*—It was decided in the case of *Smith v. Smith*, 11th June 1874, 1 Rettie, p. 1010, that a wife whose husband had deserted her was entitled to raise an action in the Sheriff Court for aliment, to be paid to her until the rights of parties were permanently settled by the Supreme Court in a consistorial action of adherence or separation. In the circumstances of that case the wife was *prima facie* in the right. The conjugal cohabitation was put an end to by the husband, and it was his duty to instruct that he was entitled to do so in the proper action in the Supreme Court. Until he did this, the wife was entitled to be supported at his expense; and the Sheriff, as the local judge, could competently be called upon to give her interim aliment.

“But when the cohabitation as husband and wife is broken by the wife herself, the relative position of parties is changed. It is the wife’s duty in these circumstances to vindicate her conduct by bringing an action of separation. *Prima facie*, she is in the wrong. She avers in the present case cruel usage on the part of her husband, which, if true, would entitle her to decree of judicial separation and aliment. The alleged cruelty is denied by the husband, and he offers to take her back and cohabit with her at bed and board. The S.-S. has held this offer to be an answer to the action, provided it be made in good faith, and he has sisted procedure, in accordance with precedent, in order to test the sincerity of the offer.

“The Sheriff is of opinion that this judgment is right. If the point were determined otherwise, it would simply come to this, that judicial separation could be obtained in Sheriff Courts. The same proof of ill-usage which would be necessary in an action of separation, would be required before the Sheriff in an action for interim aliment, asked for upon the ground that the wife was entitled to live separate because of the husband’s *savitia*. It is idle to call this a mere interim arrangement. In nineteen cases out of twenty it would amount to judicial separation, though not called by that name. Very few of the husbands would ever seek to go through another process with another proof in the Supreme Court in an action of adherence, and the result in many cases would be desertion by the husband to escape the weekly arrestment of his wages under the decree for interim aliment.

“In the case of *Paterson v. Paterson*, 14th December 1861, 24 D. p. 215, there was a decision which throws some light on this kind of case. The husband and wife quarrelled, and the husband dismissed his wife, as he thought, for adequate cause from his house. The adequate cause was a very absurd one. In answer to the wife’s action for aliment, he pleaded this cause as a good defence, and in the Sheriff Court of Lanarkshire it was held to be relevant, but not proved; and therefore aliment was granted ‘until the rights of parties should be ascertained and determined in the Supreme Court.’ On appeal to the Court of Session, the alleged adequate cause of dismissal of the wife from cohabitation was disregarded. But another defence by the husband was sustained, to the effect that he was willing to receive his wife and cohabit with her at bed and board. The Lord Justice-Clerk (Inglist) farther expressed himself thus: ‘Even supposing the state of the fact were that the pursuer had been thrust out of doors and subjected to that kind of *savitia* which consists in depriving her of the shelter of her husband’s house, even there the offer of the husband to put an end to such a state of things, and now to take his wife back, puts an end also to the claim for aliment.’ In this case the Court adopted the course followed by the S.-S. here, of superseding the cause for a short time in order to see whether the offer of adherence by the defr. was sincerely made.”

On the return of the case to the S.-S., it was disposed of by the following interlocutors :—

“The S.-S. having heard parties on the motion of the defr. for decree of absolvitor, and on the motion of the pursuer for consignation of a sum to meet the



expenses, and in respect that the offer made by the defr. to take back the pursuer has not been accepted, Dismisses the action, reserving right to the pursuer to bring a new action should she become willing to return to live in family with the defr.: Finds no expenses due.

*Note.*—The S.-S. does not think that he can give expenses against the husband in this case. Unless the S.-S. misapprehend the import of the note appended to the Sheriff's judgment of 24th February last, the wife must be held to have been legally in the wrong throughout the whole proceedings. She still declines to return to the shelter of her husband's roof, and there is not, so far as the S.-S. is able to see, any ground for holding that this action at her instance was either necessary or beneficial to her."

This interlocutor having been appealed, the Sheriff adhered, with the observation that—

"No other judgment could be pronounced except that of the S.-S. when the pursuer declined to go back to her husband. As regards expenses, the pursuer is not entitled to them, seeing that she has been unsuccessful in an action in which she is pursuer, unsuccessful on the ground that the action was incompetent."

### SHERIFF COURT OF PERTHSHIRE.

Sheriff BARCLAY.

AUCHTERGAVEN AND REDGORTON SCHOOL BOARDS v. KINCLAVEN SCHOOL BOARD.—13th March 1875.

*Competency of offer of payment under protest.*—A question as to the liability for the support of a side school having arisen between two School Boards, a demand was made for payment of a certain sum, and an action was raised to enforce payment. After investigation the School Board on which the demand was made offered payment under protest, so that they might not be foreclosed from disputing their liability when future demands for similar payments were made, should further investigation establish their non-liability. The Board also offered payment of costs so far as already incurred. The claimants refused to take payment unless made *simpliciter*, and without protest. On the calling of the case the defrs. repeated their offer in their minute of defence, and the record was closed. The following judgment was pronounced :—

"Having heard parties' procurators and made *avizandum* with the process and writs produced : Finds it admitted, and by the writings in process proved, that, on the 23rd February last, the defenders offered payment of the sum sued for, with interest and expenses as adjusted to the 'date of offer,' but 'under protest' : Finds that on the same date the pursuers refused to accept the payment thus offered 'under protest,' but insisted to have the liability of the defrs. settled under this action, and that the pursuers were to insist on a decree, failing a defence being minuted : Finds that decree being insisted on, the defrs. have judicially repeated their tender in the same terms previously made and refused : Finds in law that such tender was noways irregular or such as the pursuers could justly refuse : Therefore decerns for £21, 13s. 4d., being the sum so tendered and refused, which includes interest and expenses till date of the extra-judicial tender : Finds the pursuers liable in expenses since incurred in consequence of their refusal to accept such tender : Remits the account thereof to the Auditor to tax, and decerns.

HUGH BARCLAY.

*Note.*—All that a pursuer is entitled to demand or receive is what he asks in his summons. All that a defr. is bound to give is what is so asked. Such satisfies the action, and there is an end of the suit. There is no illegality in either party paying or receiving the money under protest so as on either side to prevent a plea of acquiescence and bar of future challenge. Nothing is more common for such protests on both sides than in the administration of the poor law, where the knowledge of new facts are ever and anon appearing to disturb previous arrangements. The defrs. did not ask the pursuers to give a receipt under a reservation, or to recognize the protest, but simply to

acknowledge payment of the money. They had no right to call on the defra. to admit liability for the future, but simply to accept payment for the present. The pursuers seem to look on this action as one declaratory of future liability, which it is not. It would have been absurd and incompetent for the defra. to offer, and the pursuers to accept, the sum due for the time past, and to go to issue, and have a declaratory decision as to the defra.' liability to pay what was offered in payment, or to decide future liability before such was incurred.

"H. B."

The pursuers have acquiesced in this decision.

*Act.—Lindsay.—Alt.—Whyte.*

## SHERIFF SMALL DEBT COURT, EDINBURGH.

Sheriff HALLARD.

SMALL v. NORTH BRITISH RAILWAY CO.—May 14, 1875.

*Carriers' Act (1 Will. IV. cap. 68), sec. 1—Sufficiency of declaration of value.*—The circumstances of this case are explained in the following judgment of the Sheriff:—

"This is a claim for £10 against a common carrier for a box of glass intrusted to his care. Against such a claim the carrier has no defence if the value be no more than the sum here claimed. But the railway company say that the box exceeded £10 in value. They found their statement on the pursuer's own averment in the account libelled, and plead that, the article being glass exceeding £10 in value, they are protected by the Carriers' Act, unless the pursuer can show that he has complied with the statutory conditions of liability. The point at issue is whether he has done so. The box was taken charge of by the defra. on the following written request by the pursuer:—'Please send cart to lift large box with stained plate-glass for Alloa. Use great care with it, as the value of goods exceeds £10 sterling.' The Carriers' Act (1 Will. IV. cap. 68, sec. 1) provides that no common carrier by land shall be liable for loss of, or injury to, certain enumerated articles, of which glass is one, when the value thereof shall exceed the sum of £10, unless at the time of delivery to the carrier 'the value and nature of such article or articles of property shall have been declared by the person sending the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.' It was agreed, after some discussion, that the letter above quoted might be taken as a declaration made by the sender to the carrier when the box was placed in the carrier's hands. Is the declaration sufficient under the statute? I am of opinion that it is not. It is quite true that the sender need not declare the full value, and may so limit his remedy to the value actually declared. It is also true that the carrier cannot evade liability by merely abstaining from making the increased charge authorised by the statute. But here, the goods being above £10 in value, there is no declaration of value which the statute requires when that value exceeds £10. If it be above £10, the carrier must be told what it is, or what, as between the parties, it is to be held to be. It is no sufficient answer to say that the carrier undertook to convey the box without asking for any more specific statement of value. A common carrier is not entitled to refuse to carry. It was for the pursuer not merely to disclose that he had materials for establishing liability against the carrier; he was bound to fix specifically the value which he should be entitled to recover in case of injury in transit, because this is a statutory condition of the carrier's liability. He did not comply with this condition. He cannot therefore recover."

*Act.—Manuel, S.S.C.—Alt.—Saunders, S.L.*

## ABERDEEN SMALL DEBT COURT.

Sheriff DOVE WILSON.

SMITH'S TRUSTEES v. HUNTER.—17th May 1875.

*Stamp Acts—Guarantees for Rent.*—This action was for the payment of the rent (£12) of a shop for the year ending Whitsunday 1874, brought by the landlord against a person who had become cautioner for the payment of the rent by the tenant under a letter of guarantee; and the question for decision was whether the guarantee not being stamped was legally binding.

Sheriff Wilson said—"This case raises the question whether a cautionary obligation for rent requires to be stamped. The fact appeared that there was no original bond for the rent, the obligation for it being verbal, but there was a written cautionary obligation. Now, upon looking over all the clauses in the Stamp Act with regard to 'bonds,' I find it is quite clear that it does not come under them; none of the heads there apply to such a writing. But then there is a heading in the Stamp Act for 'agreements' which is in the following terms:—'Agreement, or any memorandum of an agreement, made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument.' It seems to me that under the wording of that 'agreement,' it is very clear that the document founded on in this case is liable to stamp duty. Clearly the document is 'evidence of a contract,' and clearly it is 'obligatory upon the parties from its being a written instrument.' It is a contract binding a party to pay rent if another party does not—that it is a legal obligation, and it is pretty clear that it falls under the clause I have quoted. But if there were any doubt on the point, it is cleared up by a decision of the Court of Exchequer in England, which expressly applies the clause to an obligation of the same kind. The decision is *Glover v. Hackett* (June 26, 1857, L. J., vol. 26, Excheq., p. 416). The agreement in that case was almost identical with the one here. It ran thus:—'August 2d. According to Mr Hackett's request, the land at Blackfordby, under Mr Elstead, I will be bound for till next Lady-day; rent £48. (Signed) J. Glover.' Now, with the exception that the English writing is evidence that education has not got so far in England as in Scotland—for it is rather ungrammatical—it is word for word the same as the Scotch one we have in this case. It is written by one of the parties, although it was an agreement between two, and it binds the writer to pay rent in the event of the lessee not paying it. There was a full discussion of the case, and it was agreed by the whole Court that that document fell under the clause relating to 'agreement' in the Stamp Act of 1815. Upon looking to the clause 'agreement' in that Act, I find that it is verbatim the same, so far as obligatory writings go, as the present clause. The only difference between the two is, that under the old Stamp Act there was an exception where the matter of the agreement was of a value of less than £20, and the duty was considerably higher. But with these two exceptions, the words of the one heading 'agreement' and the other heading 'agreement' are identical. Having, then, regard to the words of the statutes, and the decision of the Court of Exchequer, I must—although with some regret, for the case is a hard one for the pursuer—I must give effect to the plea that the agreement founded on requires to be stamped, and must hold that in its present shape it is not such as I can give decree upon."

The case was then continued in order that the pursuer might consider as to now getting the guarantee stamped.

*Act.*—J. Paull.—*Alt.*—R. Lamb.

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ARRESTMENTS JURISDICTIONIS FUNDANDÆ CAUSA.

IN a recent paper we drew attention to one source of jurisdiction over foreigners exercised by our courts, viz., reconvention, and traced its history and progress in the law of Scotland. We propose now to deal in a similar way with the subject of jurisdiction founded by arrestments—a matter of daily occurrence, it is true, and not involved in much obscurity, but nevertheless raising questions of some interest to the student of law.

This mode, to which recourse is so often had, of establishing jurisdiction, and which has been so beneficial to our countrymen in their dealings with foreigners, is not derived, at all events, directly from the civil law, and in this respect differs from reconvention. “If I can read the language of the Roman law, there was no such thing as *arrestum jurisdictionis fundandæ causa*” (p. L. J.-C. Miller in *Scruton v. Gray*, 1 Hailes, 804). But it is not difficult to see how it found its way into the law of Scotland, which borrowed so largely from the modern as well as the ancient jurisprudence of the Continent. Those learned writers who filled so many volumes with legal disquisitions, and to whom our own lawyers went for authority in the dreary days of written pleadings and scanty reports, dwelt largely upon the subject of arrestments. Peckius and Mævius have written special treatises, and Voet bestows much attention upon it.

When we come to Scotch institutional writers, we find arrestments *jurisdictionis fundandæ causa* shortly but clearly dealt with by Erskine, who quotes as his authority the case of *Young v. Arnold* or *Arnaud*, decided in 1683 (M. 4833). This is one of the earliest reported decisions bearing upon the subject, and probably gave judicial sanction to the continental doctrine which our lawyers had begun to advocate. Stair, who wrote prior to the decision in *Young’s* case, has no observations upon the doctrine; and it is obvious from the report in Morison that it was at that time a

novelty in our courts. It cannot indeed be said that the decision as reported bears out the statement of Erskine, that an arrestment is necessary to subject a foreigner to the jurisdiction of our courts. Young had raised an action of exhibition against Arnaud, a Frenchman, and then, upon the plea that the defender was removing his effects out of Scotland, petitioned the Court to be allowed to retain any of them in his own hands<sup>1</sup> till the event of the exhibition, and to arrest such as were in others' hands till the defender found caution *judicio sisti et judicatum solvi*. The Lords, we are told, decided in favour of the pursuer, after great debate, "though in strict law *actor sequitur forum rei*, and Young, if he had ought to crave of Arnaud, should pursue him in France. But *tutius est incumbere rei quam personæ*." There is nothing to indicate that the validity of the action of exhibition depended upon the success of this petition for leave to arrest. Lord Kames indeed points out that the terms by which such arrestments are distinguished is incorrect. "The arrestment," he says, "so far from founding the jurisdiction, supposes the jurisdiction antecedently founded; for by what authority could the arrestment be used if the goods were not already subjected to the jurisdiction?" It is probable that the theory of such arrestments just sprung out of the law which enabled a judge in Scotland to lay hold of the person of a foreigner who had incurred debt here, and was *in meditatione fugæ*. If the foreigner himself could not be laid hold of, the Court could at least prevent him from removing his effects out of its jurisdiction until he had satisfied the claims made against him. In order to recover the goods, the defender would on his part be compelled to enter appearance, and defend the action, and in this way subject himself to the jurisdiction of the Court. Hence the arrestments might be said to found the jurisdiction,—incorrectly indeed, for the reason stated by Lord Kames. That learned author, in his *Elucidations*, observes: "The local situation of the effects within the territory of the judge founds his jurisdiction over the effects, though not over the person of the proprietor. It is by virtue of his jurisdiction that he grants warrant for the arrestment, and the arrestment is of no other use but to detain the goods within the territory." In the case of *Strother v. Read and others* (July 1, 1803, M., *Forum Competens* Appendix, 1), we find it observed from the bench, that "it is a rule of old standing in Scotland that an Englishman, or foreigner, having moveable effects here, or having personal debts due to him by Scotch debtors, cannot be sued here *ratione rei sitæ* without a previous form of attaching these effects *jurisdictionis fundandæ causa*, which is not necessary in the case of lands."

Such a remedy as is afforded by this power of arresting was

<sup>1</sup> Kilkerrah (supplement to Dict. v. 295) mentions that the arrestment of effects was for the first time known in Scotland in the case of Captain Hamilton and the East India Company. He gives, however, no date.

likely to be greatly made use of, especially at a time when it was not so easy for a Scotchman to follow his English debtor to his own forum. Every facility has been given for the exercise of this remedy. The warrant of an inferior judge is sufficient to lay on the nexus, and the arrestment may proceed alike at the instance of a native or a foreigner: so that an Englishman may actually sue his fellow-countrymen in our courts by securing his effects for debts due to him in Scotland; it being decided so far back as the case of *Ford* (1758, M. 4835), that a stranger might apply for the necessary warrant. But although the Sheriff can grant the warrant to arrest, it has been decided, after elaborate argument, that a foreigner cannot be by such means subjected to the jurisdiction of any inferior court. This important point received due consideration in the case of *Burns v. Purvis* (Dec. 13, 1828). In that case, Purvis having arrested in the county of Roxburgh a sum of money due to Burns, took legal proceedings against him in the Sheriff Court. Both pursuer and defender were resident in England. The case having been thrown out by the Sheriff on the ground of no jurisdiction, came up by advocacy to the Court of Session. It was there contended for the pursuer that the jurisdiction must belong to the judge in whose territory the fund is arrested; but, by the unanimous opinion of the whole Court, the action was held to be incompetent. "If a stranger," says the Lord Ordinary (Medwyn), in his note, "is to be made liable to the courts of this country, who perhaps never was within its territory in his life, and this merely because a debt due to him has been arrested within it, it seems but reasonable that he should be compelled to appear only before the Supreme Court, where it may be presumed justice will be best administered, and should not be forced to go before those subordinate and local courts which have been established solely for the sake of the subjects of this country as inhabitants of its local districts, and to which they are sometimes compelled to resort to relieve the Supreme Court of small causes." Such was Lord Medwyn's view of the origin and uses of our Sheriff Courts. On the other hand, it has been held that a maritime action following upon arrestment is competent in the Sheriff Court, and if for a sum under £25, cannot be brought in the Supreme Court (*Bruhn v. Grunwaldt*, Dec. 17, 1863, 2 Macph. 335). This exception arises from the fact that the Sheriff Courts have come in place of the old Admiralty Courts, and exercise their jurisdiction in all maritime cases. The case of Bruhn was decided by the Lord Ordinary, and apparently not brought before the Inner House. The point, it humbly appears to us, is not free from difficulty. By section 21 of 1 & 2 Vict. cap. 119, it is enacted, that the powers and jurisdiction formerly competent to the High Court of Admiralty in all maritime causes and proceedings, shall be competent before the sheriffs, "provided the defender shall, upon any legal ground of jurisdiction, be amenable to the jurisdiction of the

*sheriff* before whom such cause or proceeding may be raised." Now, arrestments do not, as we have seen, render a foreigner amenable to the Sheriff's jurisdiction in the ordinary case. By the 4th section of the Sheriff Courts Bill, it is proposed to extend the jurisdiction of these courts to actions against foreigners whose ships have been arrested within the sheriffdom.

It has long been decided that jurisdiction cannot be founded by means of arrestments in every kind of action. As was observed from the Bench in the case of *Scruton v. Gray* (Dec. 1, 1772, M. 4822), "the source of that species of jurisdiction, in this and other commercial countries, was utility and the facilitating the recovery of debts. It is properly a mercantile jurisdiction, not an universal one; and being an exception from the general rule, is not to be extended to a case not founded in the intention of introducing that sort of jurisdiction." Margaret Scruton had raised an action of declarator of marriage before the Commissaries against Gray, who had been a student in Glasgow, but had since left the country, and, "in order the more effectually to establish a jurisdiction," had used arrestments. A defence of no jurisdiction was set up, but repelled by the Commissaries. The case was accordingly advocated to the Court of Session. The pursuer contended that there was a *forum competens* both *ratione contractus* and (in consequence of her arrestments) *ratione rei sitæ*. The judgments, which are fairly reported by Hailes (i. 499), show that the Court had little difficulty in repelling the first ground upon which a jurisdiction was claimed. The mere allegation of a contract would not found jurisdiction. Here the very question in agitation was whether there was a contract or not. The real difficulty lay in the effect of the arrestments. The opinions of some of the judges exhibit a certain suspicion and doubt as to the origin and precise effects of arrestments *jurisdictionis fundandæ causa*. The quaint Lord Monboddo says, speaking of the term, "Voet says it is a barbarous term; I think it is a barbarous thing, contrary to the principles of law:" and Lord Hailes observes, "The infinite minuteness of the subjects which may be arrested *jurisdictionis fundandæ causa*, leads me to doubt of the extensive effects which the pursuer holds to be consequent on such arrestment." The conclusion to which the majority of the Bench came to was, that no jurisdiction could be founded by arrestments where the action did not spring out of commercial dealings, but was brought, as in the case before them, for the purpose of establishing personal status. The doctrine of such arrestments was treated as a legal fiction, introduced for the benefit of merchants, and the promotion of their dealings, and by which moveable things were treated as immoveable, and fixed within the jurisdiction of the Court. The pursuer of an ordinary pecuniary claim might satisfy himself with the goods thus secured to him. But it was different when the object was to affect the status of the owner of such goods. "It would be a very wide stretch of this fiction," said Lord Hailes,

"were we to suppose that the presence of an old hat had all the effect of the presence of the living proprietor. In this case Margaret Scruton cannot, in my apprehension, attain the property of John Gray's old hat, because this can only be attained by her proving her property in his person;" and Lord Alva remarked, "The principal object is to affect the man, not his goods." The view of Lord Coalston, however, was that, if a declarator of marriage would be competent in the case of a man having real estate in the country, when goods are once put in the situation of a landed estate, all the rules relating to a land estate must apply to them. The case of *Lindsay v. The London and North-Western Railway Company* (Nov. 20, 1855, 18 D. 62) is very instructive, as showing an illustration of the kind of action in which jurisdiction may be founded by means of arrestments. The pursuer was a fruit merchant, who alleged that the defenders had refused to convey his goods except upon "illegal and unusual" conditions. He further alleged that the defenders had posted up at their stations notices to the effect that his goods were not to be received, and that his character and credit was damaged by the publication of such notices. He accordingly sought to have it found and declared that the defenders were bound to take and convey his goods upon the usual conditions, and he further sued for £500 in name of damages. The summons, therefore, contained declaratory and petitory conclusions; but by a minute lodged, the pursuer disclaimed any purpose of asking for decree of declarator more comprehensive than was "necessary to clear his right in the subject-matter of the petitory conclusions." Arrestments were used in order to found jurisdiction. The defenders pleaded, *inter alia*, want of jurisdiction, as the action was one of declarator, and the Lord Ordinary (Neaves) sustained this plea, to the effect of excluding the declaratory conclusions. In his note, the Lord Ordinary, while admitting that there might be actions in which the declaratory were so purely introductory to the petitory conclusions, that the competency of the latter might support that of the former, did not recognise this case as falling under such a category. Upon the doctrine of jurisdiction founded by arrestments, he observes: "The principle upon which the law proceeds appears to be that, by this mode of arrestment, funds are fixed within the territory of the judge on which his jurisdiction may operate, and in respect of which, therefore, he may be required to exercise his judicial functions. But this very principle seems to confine the operation of this rule to those cases where the decree can be enforced against the goods arrested. Neither is there the same equity for allowing parties to proceed by this extraordinary method where the cause of action is not a special and practical demand, but some general and comprehensive question of right." Both parties reclaimed against this interlocutor, and in the Inner House the pursuer was successful. As regarded the petitory conclusions, the judges had no difficulty



in concurring with the Lord Ordinary, the Lord President remarking, "I see nothing in the description of the wrong alleged to exclude the application of the principle of founding jurisdiction by arrestment, in order to found a claim of damages; therefore, as regards the petitory conclusions of the action, I am quite clear that the Lord Ordinary has arrived at a right conclusion." And Lord Ivory, "It seems to me that, if the action had stood on these alone, there was the clearest case possible for sustaining our jurisdiction." As to the declaratory conclusions, the judges, while declining to decide "what might be the judgment of the Court, in regard to certain kinds of declarator," or "what breadth of declarators we would sustain in actions of this kind," held that, in this particular case, they were so restricted by the minute as to be competently dealt with along with the others. This case was appealed to the House of Lords (3 Macqueen, 99), with the result of having the doctrine of the Court below fully recognised and established. In the argument in support of the appeal, the arrestment *ad fundandam jurisdictionem* was treated of as "a barbarous contrivance of comparatively recent introduction, having no countenance from the Roman law, and utterly opposed to sound legal principle." An attempt seems to have been made to get rid entirely of the doctrine. "The only question," said Lord Brougham, "for us to decide is, Does arrestment *jurisdictionem fundandæ causa* exist in the law of Scotland?" In answering this question, their Lordships went carefully over the authorities, and came to the opinion that, beyond all doubt, it did so exist. The decision is important, as the first formal recognition of the doctrine by the House of Lords.

The case of *Longworth v. Hope* was an action of damages, on account of an alleged libellous article published in a newspaper, raised in Scotland against domiciled Englishmen, arrestments having been used in order to found jurisdiction. After the decision in the case of Lindsay, it was impossible to dispute entirely this ground of jurisdiction, and accordingly, as the Lord Ordinary observed, "no dispute was made, or could, with hope of success, have been so, on the part of the defenders, as to the competency of founding jurisdiction in this court by means of arrestments used for that purpose in certain classes of cases." But it was contended that, as arrestment *ad fundandam jurisdictionem* was a purely mercantile remedy, it had no place in actions of damages, as the damage to be recovered is not a debt due but a *quasi* fine. This plea was, however, rejected by the Court. Lord Colonsay remarked, in giving judgment: "In reference to pecuniary claims of damage for injury done, it does not appear that the objection of want of jurisdiction has ever been sustained, and it is very difficult to distinguish that class of cases from any other claim for debt. His Lordship goes on to notice two classes of cases to which the jurisdiction has been held to be inapplicable, viz., cases of status (such as Scruton's), and actions of a purely declaratory nature." Lord Curriehill

seems to have clearly shown the principle upon which such distinction is made when he said, "I think it (this jurisdiction) extends to all claims for debt; and this much, I think, is clear enough from all the cases, that if this claim is of a kind which, if constituted, could be satisfied by means of execution against the funds which are in the hands of the arrester, such an arrestment of these funds as that in question is sufficient to found the jurisdiction of this court to judge in an action for an alleged debt at the instance of the arrester against the owner of the funds. This is the case, whether the alleged debt arises *ex contractu* or *ex delicto*."

From this brief consideration of the authorities, it will be seen that the arrestment *jurisdictionis fundandæ causa* was a remedy originally introduced into our law from the Continent, and apparently first sanctioned by our courts about two hundred years ago; that it was probably intended exclusively for a class of mercantile cases, and to give security to creditors in trade transactions, but that it has now been so extended as to cover all cases in which the recovery of a pecuniary claim is the principal object sought, whether that claim arises under a contract or is of the nature of a fine as damage or solatium; that declaratory conclusions, if subsidiary to the petitory in any action, will not render an action founded upon arrestments incompetent, but that, probably in the case of what was purely an action of declarator, jurisdiction could not be founded by such means; finally, that, beyond all doubt, where the object of the action is to affect the status of the foreigner, the mere arrestment of his effects will not render him liable to the jurisdiction of our courts, but that, in such cases, the maxim *actor sequitur forum rei* applies.

Two questions closely connected remain to be noticed here. 1st, In order to be effectual, must the arrestment cover articles of value? 2nd, Is the extent of the jurisdiction so founded such as to enable the Court to give relief beyond the value of the property seized? It is obvious that the answer to such questions must depend, to some extent at least, upon the theory which we may have formed of this kind of jurisdiction. If we believe that in reality it extends simply over the goods arrested, and by fixing them in the country renders them subject to the disposal of the Court, an elusory arrestment would of course be of no avail, as the decree of the Court must be limited in its effect to the value of what has been secured by means of the arrestment. It will, however, be otherwise, if the fact of an arrestment is to place, as far as the action is concerned, the owner of what has been arrested in the position of a domiciled Scotchman. We have seen that, in at least one respect, this is not the effect of such an arrestment. No foreigner can be prejudiced in a matter of status by any jurisdiction so founded. And this distinction seems to indicate that it is over the property secured in the country, and not over its owner, that the jurisdiction extends. There is jurisdiction when the claim in the action is one which can

be satisfied by execution against the funds arrested, and no jurisdiction when the claim cannot be so satisfied. When we come to look at the authorities we find the opinions both as to the origin and the effect of the jurisdiction vague and uncertain. In the case of *Scruton*, already referred to, Lord Hailes said—"I admit that the extent of moveables arrested makes no difference. A bag containing ten thousand guineas, and a single toothpick at a penny the dozen, are equally moveables, equally arrestable, and will go equally in payment of the debt if the evidence of the debt is once established." Lord Kames, on the other hand, would seem to take a different view when he says—"It is a contradiction to hold that John Gray is in this country because his goods are arrested. The sense of the arrest is, that the goods may not be conveyed out of the jurisdiction." In the case of *Cameron v. Chapman* (March 9, 1838, 16 Shaw, 907), Lord Moncreiff expressed himself as not "satisfied of a point strongly assumed by the defenders, that the decree to be obtained in the principal action will be of no effect beyond the value of the effects arrested." In that case one of the questions was, whether, after an action founded upon arrestments had been raised against a foreigner, it could, upon his death, be transferred against his representatives. Lord Moncreiff held that it could be, but his judgment was reversed in the Inner House. In disposing of this question the consulted judges observe—"If an arrestment *jurisdictionis fundandæ causa* was, as the defenders assume, a process by which a moveable subject is fixed down in this country, and rendered, in so far as jurisdiction is concerned, the same in all respects as an heritable subject, there might be some plausibility in their argument." Lord Curriehill, in the case of *Longworth v. Hope*, says—"Its only purpose, and its only effect, is to enable a creditor of the owner of the arrested funds to bring an action against him in the Scotch courts, by rendering the situs of the funds as effectual for that purpose as if they were fixtures in this country. The true ground of the jurisdiction is, that the defender, by being the owner of property which is situated in Scotland, and is fixed there by judicial authority, is subject to the jurisdiction of its courts." There is, however, one important distinction between property so fixed and that which is heritable pointed out in *Chapman's* case. The possession of heritable property renders one liable to action at the instance of any one having a claim. The arrestment is of no avail to any one except to him who has used it.

In *Lindsay's* case Lord Deas says—"It is true the money or property arrested may be less than the debt. But that cannot be known at the outset of the cause. The effect of the arrestment is only to found jurisdiction;" and he goes on to add, "there must be a general rule, and this can only be attained by holding that the arrestment of any sum or subject, not elusory, will do to found jurisdiction." In the House of Lords, where what may be called the toothpick argument was pressed by the appellants, the judges

carefully avoided the questions which we are now considering. Lord Cranworth observed—"The decision of the present question does not determine how far the jurisdiction is to go—whether so as to enable the Court to give relief beyond the property seized. And if, according to the opinion of some of the judges, the only effect of the arrestment is to give jurisdiction so as to enable the pursuer to take execution against the property arrested, then the smallness of that which is arrested would only show that in such a case only a small remedy can be obtained." And Lord Brougham said—"It is wholly unnecessary for us to decide whether this goes beyond the goods arrested, or the debt arrested, if it happens to be a debt that is arrested. The only question for us to decide is, Does arrestment *jurisdictionis fundandæ causa* exist in the law of Scotland? It may, however, be observed, that these questions are really of no great importance in practice. It is quite clear that an arrestment even of a subject of small value will be a sufficient warrant for raising an action, although brought for very large claims. If the action is not defended, the pursuer cannot benefit by the Judgments Extension Act of 1868, because that Act does not apply to decreets pronounced in absence in actions proceeding upon arrestments. The pursuer must accordingly establish his claim in the Courts of England or elsewhere. When the defender does enter appearance and contest the action, the pursuer, if he can substantiate his claim, will have no difficulty in getting decree for the amount.

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#### EXPENSE OF LITIGATION IN COURT OF SESSION.<sup>1</sup>

THE discussion which has taken place on the Sheriffs' Court Bill will result in good, if it draws the members of the legal profession closer together, and makes them agree to certain reforms necessary for the proper and cheaper working of our Courts. There is not, and there ought not to be, any professional jealousy between the town and the country practitioners; for they are now

[<sup>1</sup> This article, which comes to us from an experienced professional man, we insert, because it is a subject of considerable interest and importance, and because we are willing to allow an opportunity of explanation of various views on the subject,—not because we approve of all the numerous suggestions which are made. Departing for the present from details, it appears to us that, in considering the subject, we must accept it as a fact that litigation in any Supreme Court will always be attended with a good deal of expense. A Supreme Court ought to command the services of the ablest men that can be had in the country, and these cannot be had unless they are well remunerated. When you consider the incomes that are made in commerce, and how easy a life a commercial one is compared with a legal one, it seems a wonder that so many men of ability do enter the legal profession. The reason of course is, that the remuneration they receive, or expect to receive, is not wholly, or even mainly, pecuniary.

It occurs to us to mention, that one effectual way of diminishing the expense of

members of one corporation, whose duty is to work harmoniously together for the public good, and the improvement of the administration of the law. Scotland is so small a country that it cannot prosper under division and disunion. The capital takes its increase from the resources of the country, and the country receives benefit from the prosperity of the capital; and this is especially the case in the working and administration of the law. Now, however much we may subdivide Scotland into districts or sheriffdoms, it is useless to ignore the fact, that the Court of Session is the heart and head, and the Sheriff and inferior Courts the lower limbs, so to speak, of our judicial system. The legal blood that flows from the Supreme Courts in Edinburgh circulates through that system, and returns back to Edinburgh, to be renewed and redistributed. If that blood be healthy, and not impeded in its flow, the whole judicial body will work so smoothly, that the country will hardly be aware of its existence; it is only when circulation is impeded that disease sets in, and then both the supreme and inferior members suffer, and are thrown into disorder. For a long series of years the procedure, or mode of conducting business in the Court of Session, though believed to be admirable, was antiquated and out of keeping with the age. The judicial heart beat so slowly that the blood was impoverished ere it reached the outer limbs; an atrophy seized its whole movements, and it was so constantly under the hands of the judicial doctors—drugging it with Acts of Sederunt innumerable—that its life for a time was in imminent danger. Its ill-health or constant dyspepsia told upon the country Courts, and a similar languor took hold of them. This state of things went on, growing worse and worse, until the whole judicial system became a chronic invalid. Many remedies were suggested, but none adopted. At last Lord Ormidale, in an address to the Juridical Society, so effectually exposed and laid bare the seat of the disease, that public opinion was roused, and the Legislature passed the Court of Session Act of 1868. The present Lord Advocate, Gordon, framed and carried that Act; but Lord Ormidale deserves the credit of it: for it was his address that inspired and brought it about, and the profession owe him a debt of gratitude which cannot

litigation would be to return to the system in use in the time of the Roman Republic, when the patron acted for his client gratuitously. But there are practical difficulties in the way of the revival of that plan. "A great many things have happened since that time."

Following on the track of an illustration frequently used in the article, we would venture to suggest that a person who is always in the doctor's hands, or in the hands of many doctors, some of them not skilled practitioners—getting a bolus from this one and a nostrum from another, and sometimes taking one of Holloway's pills on the sly—cannot expect to thrive. If he cannot do without all this doctoring, he had better have a change of air at once.

The surest way of diminishing the expense of litigation is by giving the go-by to finicking little points of pleading—and that is what the Court of Session is doing just now.—*ED. J. of J.*]

be too publicly acknowledged. The remedial changes introduced by that Act have so restored the vitality of the Court of Session, that it is now able and ready for any amount of business the country may require it to perform. Years of arrears of business have been swept off, and the rapidity with which it gets through its work, is only now being felt in the country, and the Inferior Courts are themselves waking up to new life and energy. They, too, need reform; the country, and especially Glasgow, demands and expects it; and the Courts themselves having suffered so long from disease, are clamouring for health, and the vigorous excitement which it yields. But before applying the knife to the Inferior Courts, it is necessary to keep in view their previous constitution as parts of a judicial system. To disjoint and dissociate them from the Court of Session, as some wish, and erect them into separate independent sovereignties, with absolute jurisdiction in heritable and moveable rights, would be an experiment, not to be tried without more consideration than has yet been given to the subject. Such may be the proper and only solution or remedy of the evils which at present unhappily prevail; but time may strike out some new light from the discussions which have already taken place, and suggest some plan for the improvement of the Inferior Courts which the profession may agree to and the country adopt with safety. While that plan is maturing, it may not be out of place to offer some suggestions for the better working of the Court of Session with a view to lessen the expense of litigation.

Rapid despatch of business being now the rule, and, it is to be hoped, in the future so imperatively enforced, that the "law's delay" may become a poetic fiction and not a reality, the next hydra-headed evil to combat is—the cost of litigation. It has been said that litigation is a luxury for the rich only; and our Courts have hitherto given too much countenance to lead many to believe that they were somewhat actuated by a belief in this principle, which is as unsound as it is vicious. Litigation is nothing more than a judicial settlement of disputes which the parties cannot settle for themselves. The Court is asked to unravel and determine a tangled piece of business, and it ought to do so promptly, cheaply, and in a business-like manner. Litigants should not be kept lingering in Court until every shadow of a shade of an argument which "Morrison's Dictionary" and the ingenuity of judges and counsel can suggest, has been started, sifted, and settled; for it ought to be kept in view that a court of justice is founded for the trial of causes, the doing of daily business, and not a debating society, intellectual gymnasium, or legal academe.

One reason why jury trial in civil causes is so unpopular in Scotland as compared with England, is its great expense. It is simpler than it was, but still the trials are unnecessarily long, and carried on with so much formality, that a trial lasting two days

usually costs from four to five hundred pounds. The Court can and ought to check this abuse; otherwise pass an Act of Sederunt abolishing jury trial in civil causes.<sup>1</sup> In order to secure the uninterrupted services of counsel already over-employed, much larger fees are given by agents than the proper conduct of the case requires; and the result is that jury trial is becoming a luxury, not only of the rich, but of the past; the practice of which the junior members of the bar are ignorant of, and need never hope to acquire. Proofs before the Lords Ordinary have taken the place of jury trials, and are becoming too long and costly. One of the luxuries here is the expensive senior counsel, who is always supposed to be in attendance, and who often is not; for as matter cannot be in two places at one time, neither can senior counsel be both before the Lord Ordinary and the two divisions of the Court at one time; yet he is engaged to be so, and agents not unreasonably complain that counsel undertake to do work which they know they never can perform.<sup>2</sup> By doing so they not only neglect their clients' interest, but do a disservice to their other equally capable, but not so fortunate and fully employed, brethren of the bar. A certain cure for this evil would be for the Auditor to allow no fees to counsel where personal attendance is not given or the work done. Should agents omit to fee counsel at each stage of the cause, counsel are freed from their engagement, and may give their services elsewhere. A like rule should free agents from their engagements to counsel, if counsel fail to be personally present, and to do the work they have engaged to do. The existence of such a rule, without its enforcement, would put an end to a system which is of so questionable propriety.

One of the most fruitful sources of expense and delay in litigation in the Court of Session is remits, and especially remits to accountants. These gentlemen have innovated upon and so usurped the duties of agents as in many cases to thrust them out of their proper professional business. They are irresponsible, unchecked by any auditor, amenable to no table of fees, and can charge as to them seemeth meet. In many cases their reports are unnecessarily long, and so expensive as to far outweigh the other costs of the suit. An accountant's report is a costly luxury, and reminds one of those famous pleas mentioned by Lord Cockburn, one of which was enough to enable a counsel to set up house, marry, and rear a family. These remarks are made not to disparage the gentlemen who compose the society of accountants—honourable and useful adjuncts to the legal profession; but, in their own and the public interests to induce them to have their accounts and reports, as those of law-agents are, regularly laid before the Auditor of the Court,

<sup>1</sup> [Can an Act of Parliament be abolished by an Act of Sederunt?—Ed. *J. of J.*]

<sup>2</sup> [The complaint is most unreasonable. If agents employ counsel who cannot possibly attend to a case, they have themselves to blame.—Ed. *J. of J.*]

and made subject to his approval and taxation. If this were done, a source of heartburning and complaint among litigants and agents would be removed. In petitions before the *Junior Lord Ordinary* unnecessary remits are often made to skilled agents to examine and report. These cause expense and delay, and as they are often little more than a repetition of the printed petition, they ought not to be resorted to except when required by the parties, or necessary for the protection of persons absent or under incapacity. This was the rule acted on by a recent Lord Ordinary, and no evil seems to have resulted from its adoption. Petitions, when unopposed, ought to be less expensive than they are. Each one costs not less than fifteen guineas, and sometimes a great deal more—a large sum for a poor wife to pay to get her children's curator or tutor discharged!

The procedure in calling parties into Court is still too costly. The signeting of summons is as antiquated as hornings and captions were, or the old form of denunciation of debtors by making them rebels to the King, on blowing three blasts on a horn. A simple writ sent through the post ought to suffice; and by so doing the whole expensive machinery of messengers-at-arms would be got rid of. It is not the Court, but the pursuivants of the Court, that eat up the litigant's bread. We know of a case lately in Court, where the messenger's fees for the service of the summons on the defenders amounted to about fifty pounds—a serious item where the whole fund *in medio* was small. But why should service be imperative? Intimation made to the defenders by letter or telegram, that an action has been raised, and lies in such an office in the Register House waiting a defence, should be enough.<sup>1</sup>

In undefended actions the parties would be saved the expense of a useless multiplicity of copies of the summons; and, in defended actions, one more certified copy summons left with the clerk to the process would be sufficient for all practical purposes. Another matter needing remedy is the system of giving a pursuer the option of choosing his own Lord Ordinary. Each of the Lords Ordinary are presumed to be and are equally competent to dispose of the cause, and that being so, the causes ought to be sent to each equally in rotation. The present mode works so ill, that an able judge, willing to work, has often to quit the Court at mid-day for want of employment.

<sup>1</sup> [Calling a party into Court is rather a serious matter, and ought not to be gone about in a slipshod manner. There must be some undeniable authentication of the fact that the defender has been made aware of the claim and the nature of the claim made against him. To serve a summons by telegraph would not lead to the diminution of expense. Merely to intimate by letter or telegram that an action had been raised, besides being open to the objection that the letter or telegram might never reach its destination, or that the telegram might be blundered, is open to the further objection that it throws upon the defender the trouble and expense of discovering what the claim is. It is the duty of the pursuer to inform the defender of that.—Ed. *J. of J.*]



## THE INTERNATIONAL LAW OF ANCIENT GREECE.

THERE are two kinds of international law, that which is deduced consciously and directly from the primary principles of justice, or (if one chooses so to state it) of general utility; and that which comes to us from the same source; but indirectly and without conscious effort, taking the form of custom. The international law of the Greeks was of the latter kind.

There is an opinion which seems to be rather prevalent that the ancient nations, and the Greeks in particular, lived in a state of natural hostility, that war was their normal condition, that a stranger was regarded as an enemy, that the rights and duties of a citizen or a state began and ended within the state territory, beyond the limits of which the citizen held himself free from all obligations except such as sprang from covenant. We are bound to consider this doctrine, for if the representation it affords is correct, we would be in error to proceed farther in our inquiry; such a state of things as is here described being the negation of law. If this view were come to, the international law of the Greeks would be conspicuous by its absence, and this article would only have to imitate the celebrated chapter on the Snakes in Iceland. In a lecture given a few years ago by a smart young member of Parliament (and we quote from it rather than from a more authoritative work, as being more indicative of popular notions on the subject), it is said—"It is a remarkable indication of the bellicose propensities of these peppery little states, that instead of declaring war they used to declare peace. The instant that a five years' or a twenty years' peace came to an end, the contracting parties were at full liberty to begin driving cattle, &c., thereby evincing their belief that war was the normal condition of human existence." This is a mistake. (1) The Greeks did declare war. They did so, if not more publicly, more formally and more ceremoniously than we do. We make a proclamation in our own country; they despatched heralds into the opposing state to make proclamation there. Really, the only question in the matter is, whether a declaration was made in all cases, or only in case of a rupture between states bound by covenant. There is an incident in Greek history enabling us to settle this point. Before the Peloponnesian war Corcyra stood isolated, having no relations with the other states of Greece (Thucydides, i. 32). Yet the Corinthians, before commencing hostilities with that island, "first sent forward a herald to declare war against it" (Thucydides, i. 29). Nor can it be said that Corcyra, as a colony of Corinth, had an intimate relation with it which stood in place of a covenanted alliance; for Corcyra refused to pay the rightful and accustomed honours expected by a metropolitan city from a colony. If there was a state in Greece whose international rights Corinth must have been

inclined to neglect, Corcyra was that state. The fact that, even in the case of a state which had violated colonial usages, which acknowledged not the claims of kindred and gratitude, the ceremony of proclaiming war was not omitted, proves that this ceremony must have been so deep-rooted in the Hellenic usages as hardly to be dispensed with upon any ground whatever. (2) "The instant that a five years' or a twenty years' peace came to an end, the contracting parties were at full liberty to begin driving cattle," &c. A peace for a term of years is a *truce*, and there is no violation of international right in resuming hostilities when the time agreed on for their suspension has expired. (3) One of the statements being false, and the other irrelevant, the conclusion built on them fails. Nor can it be supported on other grounds. War may have been the *usual* condition of the Greeks, but it was not their *normal* condition. England during the reign of George III. was *usually* at war; but would an Englishman have considered war the normal condition of his country?

In Greece wars were frequent; the causes of them were often insufficient, but men did not go to war without *some* immediate cause. In Alcibiades I. Socrates is made to say—"Do you know what are the usual grounds and complaints urged when war is undertaken?—Yes; complaints of having been cheated, or robbed, or injured.—Do you mean to advise the Athenians to fight those who behave justly or those who behave unjustly?—The question is monstrous; certainly not those who behave justly. It would be neither lawful nor honourable." Even in that early time from which Homer drew his pictures of men and customs, war was not waged without some allegation of injury. Achilles declares that he has no enmity with the Trojans on his own account; they had never driven away his cattle nor spoiled his crops. The assertion that in ancient times a stranger was deemed an enemy is founded on a passage in Herodotus and another in Cicero. Herodotus merely says that the Spartans called the barbarians strangers (*ξείνοὺς*, Herod. ix. 11 and 55), a statement which proves nothing except as to the Spartans, and which is only a matter of nomenclature. And what is said by Cicero? He says that, of old, an enemy, instead of being called by his proper name *perduellis*, was called *hostis*. Why? *Lenitate verbi tristitiam mitigatam*. And then he explains that in early times *hostis*, in its proper signification, meant the same as *peregrinus* in his own time. Varro (*De Latina Lingua*) writes to the same effect. This passage proves anything and everything except what it is alleged to prove. The case is clear. *Hostis* meant "stranger," and it meant "enemy," but not at the same period of history. Originally it signified "stranger." As a softer epithet it was applied to an enemy, and at a *later* period, probably in consequence of its being so applied, it received its inimical acceptation. A Frenchman might as well infer the antipathy of Englishmen to pleasure from Fuller's commendation of a "*painful*

preacher," or that they have peculiar notions of justice, from a certain form of prayer in which a wish is expressed that "magistrates may *indifferently* execute justice." Nay, we go further, and hold the passage *disproves* the doctrine of natural hostility. War was considered such an abnormal condition that men smoothed over the ugly fact with a milder name. There are certain isolated passages in the Greek writers which are lugged in to establish the view we are opposing. Aristotle complains that men who were just enough in their own state paid very little regard to justice out of it. But this is a censure, and proves that if the *fact* was wrong, the *opinion* which was entertained was right; and besides the censure would not be inapplicable to many states in modern times, when international obligations have been fully settled. The Syracusan Hermocrates, in his speech to the Camarineans, speaks of the Ionians and Dorians as perpetual foes (Thucydides, vi. 80). But in the debates on Mr. Pitt's Commercial Treaty in 1786, Mr. Fox and Sir Philip Francis declare that France and England are natural enemies. Does any one suppose they imagined England was under no obligations of honour and justice in its dealings with France? In each case the speakers meant no more than that the races had adverse interests, and were natural *rivals*. In his speech to the Melians, Euphemus, the Athenian ambassador, is made to say that, as both parties were well aware, those who had the upper hand use their power, and the weak grant what they cannot refuse (Thucydides, v. 89). Mr. Grote distrusts, in this instance, the accuracy of the historian. It is not worth while to quote similar pieces of bravado which Plutarch puts into the lips of Agis and Aristides. If we suspect Thucydides, how shall we trust Plutarch, who can never resist the temptation of relating a startling sentiment? But the real reply to an argument founded on such expressions, is not to deny the accuracy of the historian; it is that these sayings seem mere pieces of bravado used by men who knew they were doing wrong, were too careless to deny it, and chose rather to brazen out the infamy of their proceedings. If we are to judge by details, let us not take isolated speeches, but isolated facts, which are a surer indication of opinions, and if we do so we shall easily prove that there was no international law among the Greeks nor any other nations.

The assertion that the Greeks held themselves bound by no obligation to other states without an express compact (as has been said by Mitford, and by Wheaton, following in his train), proceeds from a misinterpretation of terms. "Peace" with the Greeks meant two things—a peace by covenant, concluded in a solemn fashion, with oaths and libations; and peace, the natural and ordinary state of men. "Ἐκσπονδοὶ" by no means signifies "outlaws," as Mr. Wheaton has said. "Ἐνσπονδοὶ" and "ἔκσπονδοὶ" meant allies and non-allies—federates and non-federates. Mr. Wheaton is quite wrong in saying that "the philosopher who visited foreign countries was

exposed to be captured and sold as a slave." From this one would infer that there were no *metics* at Athens, and that one's reading about them had been a dream. The right of access varied in different countries. Foreigners, as we know, were excluded at Sparta; were encouraged to settle at Athens. The privileges of aliens varied according to the municipal law or the agreement of the states. When "*Isopolity*" existed, the citizens of the one state had the privileges of citizens in the other.

It has been said, also, that any public rights, or appearance of public rights, which existed in Greece arose not from law, but from religious sentiments and ceremonies. The assertion might be pertinent if we were considering the immediate source of these rights, but it by no means disproves their existence. Further, there were few things public or private in Greece with which religion was not intertwined. With us the crime of murder and the tribunal which is to try it are purely civil matters. But the Senate of Areopagus, when stripped of other privileges, still retained its cognizance of intentional homicide, for that cognizance, says Mr. Grote, was a part of old Attic religion not less than of judicature (Grote's History, v. 481).

In thus arguing against the doctrine of natural hostility, we by no means wish to imply that the Greek theory or practice as regards international intercourse was such as would find the least favour when judged of by the standard of to-day. Properly speaking, the Greeks had no *system of international law*, they had a *set of international customs and usages*, and some of them were, as we shall see, very bad customs indeed. Their practice in war, even *inter se*, was of merciless severity, and their attitude towards the peoples beyond the limits of the Hellenic world was an attitude of indifference sharpened with contempt.

A defect of international law frequently adverted to is the want of a common authority to administer and enforce it. Among the Greeks there was an institution which had something of the form of an authority, at least to decide disputes, though it had not the complement of this power necessary to make it practically of advantage, the power of enforcing its decisions. We refer to the great Amphictyonic Council—the council which met at Delphi and Thermopylæ. The common view now is that this was a religious, not a political body. This is true, and when we consider that the council was constituted according to *tribes*, while the Greek political system in historical times was one of *cities*; that some states sent no members to the council and others more than their share, we can guess that the Greeks would not have submitted to any habitual or important political action of a body which was no fair representation of Greece in its existing circumstances. The mere fact of its being primarily a *religious* body is not of much importance in this relation, for we have many instances of religious bodies gradually assuming political and judicial functions. One cannot help thinking

that, in some instances, the action of the Amphictyones was more than religious. (1) It is stated that the Lacedæmonians accused the Thebans before the council of having, contrary to international right, erected a metal trophy. Mr. Freeman, in his History of Federal Government, states that the passage on which this assertion is founded is spurious, and that this was a question regarding a religious ceremony. But if the council were debarred from taking cognizance of things which had a religious side, their jurisdiction would have been rather limited. (2) There is certainly one case which seems to have very little of the religious element. About 470 B.C., some Thessalian traders, who had been plundered and imprisoned by the piratical inhabitants of Scyros, raised a complaint against them before the council, which thereupon condemned the island to make restitution (Grote's History, v. 408). The Athenians, undertaking to execute the decree, bettered the instruction,—expelled the inhabitants, and peopled the island with settlers of their own. This case shows the limited action of the council from want of a force of its own; (if it had possessed a force of its own, it would have been not an international tribunal, but a federal power). A decree was of little avail, unless some state chose to put it in force, and a state chose to do so only when that served its own ends. Against a powerful offender like Sparta (fined by the council on the complaint of the Thebans on account of a gross breach of international rights) its decree would have no effect; for no state would dare to execute it. It must have been therefore only in secondary matters and against secondary states that this council had any influence. In respect of these it presents the rudiments of an international tribunal.

We purpose to present a sketch of the international law of the Grecian states, as it was in time of peace and as it was in time of war. And, first, of peace.

We do not mean to sketch the rights and relations of metropolitan states and their colonies, of imperial states, dependent states, and tributary allies. These relations seem never to have been well settled, and seem to have depended more on fact than law; and besides the subject (although it is treated of by Schoemann under the head "*De Jure Gentium*") seems to us to belong rather to politics and government than to our present subject.

One of the best settled principles of international law, as it is understood in England, is that each state has the right to choose its own form of government, its own rulers, to compose its own dissensions, and that no foreign state, except in very special circumstances, can interfere with it in the exercise of this right. But in Greece this rule was not attended to in the least. Oligarchical government constantly abetted the efforts of oligarchical parties in a democratic state, *et vice versa*. It is better to give authorities for every statement, but if one were asked to give an authority for this statement, one would be obliged to say, see the History of Greece, *passim*.

*Embassy.*—The institution of resident permanent legations is modern,—is indeed of comparatively recent origin. In Greece negotiations between states were conducted by persons appointed for the occasion,—heralds or envoys, or both. Heraldry was religious officers, and seem to have been a hereditary caste. “At Athens heralds were fed at the cost of the state in the Tholos or Prytaneum, where doubtless they also resided” (Boeckh, *Public Economy of Athens*). It is often difficult to know whether the person sent was a herald or an ambassador; but when both were sent, the duties of the herald were more of a formal and ceremonious nature: the real business was transacted by the ambassador. To ambassadors great respect was paid in all the states of Greece. “It may be seen from the speech of Demosthenes for the Crown, that, in the Greek states, they were not only honoured with the first places in the theatres, but were hospitably entertained, and generally resided at the house of the *Proxenus*; although an instance occurs of an embassy to Philip of Macedon having, for particular reasons, preferred the public inn. . . . The treasury generally paid them a sum in advance for thirty days as travelling money (*ἐφόδιον, πορείον*). In the time of Aristophanes the ambassadors received two or three drachmas a day. . . . In general the Athenians sent ten ambassadors, and occasionally not more than two or three” (Boeckh).

The person of heralds and ambassadors was inviolable. To kill one, even coming from a barbarian power, was considered both a violation of international custom and a sacrilegious act. Herodotus clearly implies that the murder of the envoys sent by Darius to Athens and to Sparta was a nefarious deed. He shows (*more suo*) how the gods avenged the crime on Sparta, but he is a little puzzled to say what punishment fell upon Athens (vii. 133). In after years two Spartan heralds were sent to Xerxes, to offer their lives as an atonement. The answer of the great king, “that he would not act like the Lacedæmonians, who, by killing the heralds, had broken the laws which all men held in common,” shows what sacredness attached to the character of ambassadors even in the barbarian mind. In the time of Pericles, an Athenian herald having been sent to Megara on a mission of remonstrance, had been so rudely handled, that his death soon after was attributed to the maltreatment he had received. This was imputed as a monstrous crime to the Megarians, and contributed to the long-continuing feeling of hostility of the Athenians towards them (Grote’s *History*, v. 103).

The inviolability of ambassadors is, by the best modern writers, not held binding except on those states to whom they are accredited. The murder of the ambassadors of Francis I. by the subjects of Charles V. was not considered a breach of ambassadorial privileges (Wheaton’s *Elements*, vol. i. p. 270). The same rule held good in Greece. On one occasion, Lacedæmonian envoys, taken by the Athenians, to whom their mission was not directed, and who were

then at war with Sparta, were put to death (Thucydides, 2-67). They were ambassadors, but not ambassadors so far as the Athenians were concerned.

The right to send ambassadors is a right belonging solely to a sovereign state. No member of a federal state can send them; that privilege belongs to the central authority. Yet we find some cities, members of the Achæan League, sending ambassadors of their own (Freeman's History). Federal government—the most artificial of all forms of government—was, at that time, but an experiment, and its principles had not been fully developed.

Although permanent resident legation was unknown to the Greeks, there was an institution remarkably like it, and which pretty nearly answered the same end—*προξενία*. In early times individuals and families frequently bound themselves by a peculiar tie of hospitality, and this tie was hereditary. See the episode of Glaucus and Diomedes in the sixth book of the Iliad. In course of time the scope of this connection became extended, so that it included not only individuals and families, but *states* as well. The Pisistratidæ, for example, became the *proxeni* of Sparta. Being connected with a state, proxeni came to have public duties and privileges, and we can understand how it came to be an object of ambition to be *proxenus* of a leading state. Even during the middle of the Peloponnesian war, "to act as *proxenus* to the Lacedæmonians" was accounted an honour even by the greatest families in Athens" (Thuc. vi. 40). Cimon and Nicias were *proxeni* of Sparta, and Alcibiades desired to resume the office which his ancestors had held and renounced. The circumstance of proxeni naming a child after the state they represented shows in what esteem the office was held. (Cimon had a son called Lacedæmonius. We read of a proxenus of Sparta called Laco. Bloomfield, in his notes on Thucydides, iii. 52, remarks upon the circumstance of a Spartan bearing the name Athenæus, ascribing this to the same cause. But *this* name appears to have been assumed from private friendship.) The Spartans sometimes sent one of their own number to act as proxenus, but this practice was not common even with them, and was not adopted by almost any other Hellenic state. (See Schoemann, *Antiquitates Juris Publici Græcorum*.)

The title of *proxenus* was an honour, a personal distinction (*proxeni constituti partim honoris causa*, says Schoemann), but it was something more: it involved the performance of certain duties. *Proxeni* are often compared to our consuls, and so far as the office is a mere personal distinction the analogy is complete enough. But the functions of the *proxeni* were more extensive and important. Consuls have no political functions (except where there is no ambassador from the power they represent, as is the case with the English consul at Rome): *proxeni* had. Their functions were threefold. (1) They received, protected, counselled traders and other strangers belonging to the state they represented, and if any person of that

description died, they took care of his property, and gave information about it to his own state. (See Boeckh, vol. i. p. 71, English translation.) (2) They were political agents of the state appointing them, supporting its interests as much as their duty to their own state permitted. Being generally leading men in their own country, politicians of some weight in the assembly, they could very effectually assist the views of their "clients;" and in this respect they held a position similar to that of some eminent politicians in our own country, who have acted as political agents for a colony, as Burke acted for the State of Georgia, and Charles Buller for one of the Australian colonies. Further, they received the ambassadors, entertained them, procured for them admission to the assembly and the theatre, and assisted in framing treaties. Æschines tells us that Cimon, because he was the *proxenus* of the Lacedæmonians, went of his own accord and concluded a solid peace between two powerful states. When it was desired to conclude a peace or renew a truce it was the etiquette for a state to make application through its *proxenus* (Grote, vii. 4). Alcibiades wished to renew the connection between his family and Sparta, and so have the honour of concluding the treaty between that state and Athens, and he felt aggrieved because it was concluded through the agency of Nicias, the existing *proxenus* (Thuc. v. 43; vi. 90). We read of the Athenian *proxeni* at Mitylene communicating intelligence of the meditated revolt (Thuc. iii. 2). But they did so not as Athenian *proxeni*, but as malcontent Mityleneans. (3) Besides supporting the interest of the state he represented, the *proxenus* was a medium through which its support was communicated to the party he espoused in his own state. This was one of the ways in which Sparta contrived to strengthen the oligarchical party in Athens. We may be sure that the Spartan *proxenus* there was never taken from the democratical party. (See Grote, v. 485.)

The *proxeni* had many privileges. In a war between their own state and that for which they acted their persons were secure. Even after the cessation of the connection, favour was shown to one who had stood in a relation of such intimacy and confidence; and we shall see a remarkable instance when we come to speak of warlike relations. It may have been partly on this ground that Gylippus, the Spartan general in Syracuse, showed such anxiety to have the life of Nicias spared. On the other hand, we read in Thucydides that among the prisoners taken at the surrender of Plataea was one Laco, the *proxenus* of the Lacedæmonians, and in a subsequent passage it is stated that all the prisoners were put to death without exception (iii. 52, 68). But the *whole* conduct of the Lacedæmonians on this occasion was contrary to the usages of war. Foreigners appointed *proxeni* for Athens enjoyed many privileges, such as the right of acquiring property and exemption from taxes; privileges not enjoyed without a special decree, but the decree followed as a matter of course. M. Pardessus mentions among the prerogatives of



*proxeni* their right to use a seal, on which were engraved the emblems or armorial bearings of the town or country which had given them its confidence (vol. i. p. 52).

*Arbitration.*—When a dispute arose between two states, resort was not immediately had to arms; a provision for referring to arbitration any dispute that may arise is frequently to be met with in treaties of peace or alliance. The Corcyreans, at the commencement of the Peloponnesian war, offered to refer the subject of controversy with Corinth to the decision of any of the Peloponnesian states or of the Delphic oracle. (Thuc. i. 28.)

We next come to the public International Law of the Greeks in time of war.

As with us, there were in Greece forcible means, short of actual war, of protecting the rights of a state, and these means were negative or positive, restrictive or aggressive. Of the first an example is found in the decree passed by the Athenians during the thirty years' peace, prohibiting the Megarians, under pain of death, from all trade or intercourse with Athens, or any of the ports within the Athenian empire (Thuc. i. 139). Among the positive means of reprisal was the authorization to private persons to commit depredations on persons or property belonging to the opposing state. During the peace of Nicias, the Athenians having in their incursion from Pylus taken spoils from the Lacedæmonians, the latter "did not even on that account renounce the treaty and go to war with them; but only made proclamation that any one of their people might commit depredations on the Athenians" (Thuc. v. 115). There is a similar case mentioned by Polybius. In addition to these general reprisals, there was also what publicists call a special reprisal, where authority is given to private persons to avenge an injury done not to the state but to themselves. The custom of *androlepsia* was of this kind. If a state refused to give up one who had murdered a citizen of another state, it was lawful for the relatives of the murdered man to capture three citizens of the offending state, and detain them till satisfaction was made (Schoemann, vi. 6, § 2). This provision is similar to one contained in a statute of Henry V., which declares that "if any subjects of the realm are oppressed in time of peace by any foreigners, the King will grant letters of marque in due form to all that feel themselves aggrieved."

When reprisals, at least general reprisals, were to be made, proclamation was made in the state authorising them. But when a public and solemn war was to be waged, proclamation was made by heralds sent to the opposing state. "Heralds," says Grotius, "were usually sent to denounce war among the Greeks *clad in a parti-coloured coat, and armed with a bloody javelin.*" War made without denunciation was rare, exceptional, and not *en règle*. We have indeed instances then, as we have them in modern times, of the rule being violated, *e.g.*, the attack of the Thebans on Platæa during the Peloponnesian

war, and a later date the seizure of the Cadmeia by the Spartans, already referred to.

The methods in which war was to be carried on might be determined by paction either made for the occasion, or contained in an antecedent treaty or other obligation. Instead of a whole state engaging in war, it was not unknown in early times to select one or a number of champions from each side, and allow the dispute to be decided by the result of such combat. In the sixth century B.C., there was a contest of this sort between the Argeians and the Spartans; three hundred fighting on each side. But when it was provided in a treaty between these, *circa* 420 B.C., that in the parties' option the right to a disputed territory should be decided by such a combat within the territory, and that it should not be lawful to carry the contest beyond its boundaries, such a provision appeared foolish and out of date, and it was accepted by the Spartans as a means of postponing the difficulty. (Thuc. v. 41; see Grote, vii. 39.) Or even when the contest was waged by whole states, restrictions on the ordinary rights of war might be imposed by agreement. Thus, says Grotius, "we find it anciently covenanted between the Chalcidenses and the Eretrienses that during the war between them it should not be lawful to *cast or dart anything*" (Grotius, *De Jure*, &c., iii. 4, 16, Eng. transl.). The Amphictyonic oath forbade states belonging to the confederacy, when at war with each other, to cut off the water or to raze a city (Freeman's *History of Federal Government*, p. 128). But there is no instance, so far as we know, of the oath being attended to.

Upon the declaration of war, and most likely before it, an embargo was laid upon all the enemy's vessels which happened to be in the harbours (Boeckh, i. 76). According to modern law, commerce between the people of the contending nations ceases as a matter of course, though (we suppose *ob majorem cautelam*) there is sometimes a special interdiction. It ceased also among the Greek states; and indeed the impeding of commerce was one of the principal means of carrying on war. In his work on the Public Economy of Athens, so frequently referred to, Boeckh has said, "It is obvious that war was necessarily attended with certain restrictions and limitations; for example, the manufactories of arms at Athens supplied the consumption of many nations. It was natural therefore that laws should be directed against those who provided the enemy with arms. Thus Timarchus decreed that whoever furnished Philip either arms or tackle for ships should be punished with death. But in addition to these restrictions even the *importation* of some commodities was occasionally prohibited in time of war; as, for example, of Boeotian *lamp-wicks*, of which the real reason is not, as Casaubon concluded from the jokes of Aristophanes, that the Athenians were afraid of these lamp-wicks raising a conflagration, but that all commodities imported from Boeotia were excluded, for the purpose of harassing their country by a stoppage of all inter-

course." It is perfectly intelligible that a special decree may have been made forbidding intercourse, and that a penalty should have been imposed on the exportation of goods contraband of war, whether specially intended for the enemy or not. But we must not imagine that, in the absence of such special prohibition, trade or intercourse of any kind was permitted to a citizen either by his own country or by the enemy. Such intercourse would have been exceedingly risky, to say the least. And the fact, that persons desirous of visiting a hostile state used the protection of a herald, proves that the right of intercourse ceased when war commenced.

The custom of modern states is to make war with as little loss to life and property as is compatible with effecting their object. The Greeks did not refine upon the idea of hostility.

There are one or two cases in Greek history which seem to show that there was no restriction whatever in the right of the conqueror. At Mycalessus, in Boeotia, a body of Thracian mercenaries, who had been in the pay of Athens, plundered the houses and temples, and massacred every living thing that came in their way—men, women, children, even the draught-cattle (Thuc. vii. 29). But (1) this act was committed not by Greeks, but by Thracians, whose bloodthirsty disposition was notorious; and (2) from the language of the historian, it appears to have excited the utmost horror throughout Greece. Again, in B.C. 220, the Ætolians at Cynætha massacred every one who fell into their hands—friend and foe alike. Harsh as the Greek war-law was, it did not sanction such cruelties as these. These are exceptional cases, no more to be taken as indicative of the Greek usages, than the Spanish Fury at Antwerp is of the modern European usages.

The Greek law of war was this: The conqueror had a right to slay, sell, or detain till ransomed, all who were taken with arms in their hands, or who were capable of bearing arms; to sell the women and children as slaves; and to seize houses, lands, property of every description belonging to the conquered. This was the *right* of the conqueror, but it was not acted upon except in moments of exasperation. The captors of a *revolted city* were very apt to exercise their right to its full limits. When the Athenians took Scione, all the male inhabitants of military age were put to death, the women and children sold into slavery, and the lands made over to allies of Athens (Thuc. v. 32). A similar decree had been pronounced as to Mitylene, but the punishment was commuted, only 1000 persons being executed (Thuc. iii. 50). The extreme right was exercised towards the Island of Melos, which had not been subject to Athens, and would not therefore revolt; and Thucydides relates the occurrence without comment (v. 116). Nor was the slaughter of prisoners confined to the case of a captured town. Nicias and Demosthenes would have been put to death by the Syracusans if they had not anticipated them by committing suicide.

We have stated what appears to have been the *right* of the victor. The ordinary custom was to preserve the lives of non-combatants;<sup>1</sup> they were only sold as slaves. Polybius distinctly asserts that the sale of the inhabitants of a conquered town was according to the laws of war. "O king of Sparta, save thy suppliant from the *slavery which awaits the captive!*" said a Grecian woman of the Persian camp to Pausanias, after the battle of Plataea. "Fear nothing," said the king; "*as a suppliant thou art safe*" (Herod. ix. 76). Nor was it the practice to slay combatants even when taken prisoner; they were too valuable as articles of commerce. "*Vendere cum possis captivum, occidere noli,*" says Horace; and the Greeks spared the lives of prisoners more for the reason here indicated than from motives of humanity. Besides, prisoners of war had their value for purposes of negotiation. They were sometimes exchanged (Thuc. ii. 103, v. 3); or ransomed (Thuc. iv. 69); if not, they were sold. The familiarity of this practice, says Mr. Freeman, comes out strongly in an incidental notice in Polybius (v. 95). Some Ætolians were taken prisoner by the Achæans, and among them was one who had been the *proxenus* of the Achæan state. On account of this personal claim on his captors, he was, after a time, released without ransom. The sale of the prisoners who had no such claim is assumed as a matter of course. But it is needless to multiply instances of this practice. It seems to us strange that the lives of prisoners of war were not *always* spared, not only because they were valuable as articles of commerce, but because the Greek states considered it a peculiar indignity that any of their subjects should be prisoners, and had such anxiety on the subject, that they were willing to make great sacrifices, and abandon solid advantages, in order to procure their return. Witness the anxiety of Sparta to procure the release of the prisoners captured at Sphacteria.

The slaughter of the wounded was not contrary to the war-law of the Greeks (Thuc. iv. 35).

*Effect of War on Property.*—Private property, at least on land, is, according to modern usages, safe from the ravages of war. It was not so in Greece. During the Peloponnesian war, to ravage Attica was the annual custom of the Lacedæmonians. A similar rule was observed in maritime war. An enemy's ship and its cargo were lawful prize of war (Pardessus, vol. i.).

After a victory, in the absence of special stipulation, the whole property of the vanquished accrued to the victor. "This is an everlasting law with all men," says Xenophon, "that a city being taken by force, all the goods and riches are the conqueror's." Plato likewise says that "all that was the conquered's after the victory becomes the conqueror's" (Grotius, iii. 6, 2). If the inhabitants of a

<sup>1</sup> When Demetrius took Thebes, in B.C. 292, he put to death only ten of the leaders (Grotius, iii. 11, 5). As time advanced, the usages of war seem to have grown milder.

conquered town or country were not sold or slain, they were likely to be expelled, and their territory settled anew by the subjects of the conquering state, as we see in the cases of Eubœa in B.C. 450, Potidæa, and Ægina, captured by the Athenians. Grotius has a curious passage about incorporeal moveables passing from the vanquished to the victor, and tells us that Alexander the Great having conquered the Thebans, by the right of conquest forgave the debt of 100 talents due to them by the Thessalians, who consequently stood fully discharged (iii. 8, 4).

We shall mention some restrictions on war peculiar to the Greeks, and which seem closely connected with their religious sentiments.

The burial of the dead was a duty of peculiar sanctity and obligation in the eye of a Greek. The neglect of this duty could only occur in some extraordinary and calamitous crisis, as during the plague at Athens, or when the Ambraciot herald stood astounded at the extraordinary number of the slain, or during the flight of the Athenian army from before Syracuse. After a battle, accordingly, the vanquished sent a herald to ask permission to carry off the bodies of the slain for sepulture. This request was regarded as a confession of defeat. It does not seem to have been ever refused, even to barbarian enemies. It is stated that the bodies of sacrilegious persons who had despoiled or profaned temples were not allowed burial.

It was the custom of the victor to erect a trophy on the field of battle; or, in case of a sea-fight, on the nearest point of land. The trophy was consecrated to some divinity. If the victory was doubtful, each army having obtained a partial success, a double trophy was erected (Thuc. i. 54, 105). The points on which international law has a bearing on this ceremony are these:—(1) The trophy, if rightfully erected, was inviolable, and the enemy over whom the victory was won, and on whose soil the trophy was erected, was not permitted to remove it. In 458 B.C., the Corinthians surreptitiously raised a trophy to commemorate an alleged victory over the Athenians. The latter, who had already erected one of their own, attacked the Corinthians, and slew those who had erected the trophy, and routed the rest (Thuc. i. 105); but it is not stated that the Corinthian trophy was demolished. On a subsequent occasion, however, we read that a trophy erected by an army which was unable to remain master of the territory, was held to be unlawfully erected, and was destroyed (Thuc. viii. 24). (2) As the Greeks were in a sense brethren, and as it was, therefore, undesirable to perpetrate such a mark of degradation, it was the custom to construct the trophy of wood, or other perishable material, likely to endure no longer than the memory of the occurrence in the minds of men. The Thebans complained to the “*magnum concilium Græcorum*” that the Lacedæmonians had erected a *metal* trophy, as we have already noticed.

Saint Croix mentions among the restrictions on war the inviola-

bility of suppliants who had taken refuge in a sanctuary. But this does not seem to have any special connection with *International Law*. The Hellenic peoples worshipped the same gods, and they respected the places sacred to them wherever situated (on their own soil, or on that of their enemies), or whoever might take refuge therein. If a murderer was safe, surely an enemy might be. The same remark applies to the inviolability of temples (not every temple was a sanctuary). The Greeks did not respect the temples and images of the barbarians. Plutarch mentions that Agis did so, evidently thinking it a noteworthy circumstance. If a Greek respected a temple or sacred place in the territory of his enemy, he did so not because it was the temple of his enemy's god, but because it was the temple of his own god.

*Festival Truce.*—Prior to the celebration of the great festival games, especially the Olympic, in order that all persons might have free access thereto, a truce (*ἐκεχειρία*) was proclaimed. The month for which this truce lasted was called *ιερούνηια*. The peace was proclaimed first at the place where the games were to be held, thereafter by peace-heralds in other parts of Greece. It would appear that only states in whose territory proclamation had been made, either were bound by the truce, or could take advantage of it. This was the point in dispute between Sparta and Elis. The Spartans occupied Lepreum (which the Eleians claimed) during the truce; and they justified themselves on the ground that the truce had not been proclaimed in Sparta when the troops left. The Eleians replied that it had been proclaimed in Elis, and thinking themselves aggrieved, excluded the Spartans from the festival (Thuc. v. 49).

This subject is not satisfactorily explained in the authorities we have consulted. Surely it is too broad an assertion to say that at the period of the Olympic and other great festivals, hostilities were suspended through all Greece, and that the nations who had been contending, and would soon be contending again, flocked to Elis to engage in the peaceful contentions of wrestling and chariot-driving. We know this for certain, that during the Peloponnesian war, up to the peace of Nicias, the Athenians were not represented at the festival. (Mr. Grote lays stress on the stipulations in that treaty, and the treaty of truce for one year, providing for free access individually and by public deputation to the temples common to the Greeks. One might reply that this was a provision for access at *all* times, in addition to the access allowed at the periodical festivals.) The case seems to us to stand thus, if we may hazard a conjecture. This great festival at Olympia was originally Dorian, and though it came to be Pan Hellenic, it always retained a specially Dorian character. To the Dorian states the peace was proclaimed always. But as to the *other* states of Greece, the administrators of the festival had it in their option to proclaim or not to proclaim. In a struggle like the Peloponnesian war, the proclama-

tion was not likely to be made to the Athenians. It was either not made, or if it was made, the invitation was not accepted. The presence of the Athenians at the Isthmian games, when Corinth and Athens were about to commence war, seems to have been unusual; and when Thucydides mentions the circumstance he takes care to tell the reason why, "for the peace had been proclaimed" (Thuc. viii. 90). It is true that a Rhodian was victor at Olympia at a time when, we have been supposing, no proclamation was made on account of the war. How came he to be there, Rhodes being a subject of Athens? The answer is, that those who went to contend at the games, the athletes, were safe in all circumstances. Their persons were considered little less than sacred. And, besides, the circumstance of one person appearing at the games does not prove that it was *safe* for any one to venture through the territory of rival states on his way to the festival. He may have succeeded in eluding the risks to which he was exposed, and having once got to Elis, he would be safe enough there, where the peace had first been proclaimed, and where the festival was in progress. Be this as it may, it is certain that the Dorian states were exceedingly averse to aggressive operations during the festivals, whether common to the Greeks, or peculiar to themselves; even to oppose the invasion of Xerxes—a reluctance on that occasion almost fatal to Greece. (Herod. vii. 206; ix. 11.)

*Neutral Rights at Sea.*—At the beginning of the Peloponnesian war, the Lacedæmonians captured all merchantmen, whether neutral or not, put the crews to death, and appropriated the ships and cargo (Thuc. ii. 67). But this capture was piratical, and the slaughter unwarrantable, even according to the not very humane customs of the Greeks; and we read afterwards that the violation of law was signally revenged. The defence which Poppo makes is itself indefensible, "that the whole Lacedæmonian confederacy was terrestrial, and *therefore* they put to death as enemies all whom they took at sea" (Bloomfield's transl. of Thuc. iii. 392). *The right of search* was permitted by the Greek custom (Pardessus, and citations there). We fear that in many cases the cruisers, particularly if they were privateers (the employment of which in war was lawful among the Greeks), would not take the trouble to search.

*Neutral Rights on Land.*—Armed troops could not cross neutral territory without special permission, which was regarded as so important, that provision is made in at least one treaty of alliance, that such permission shall not be granted except upon joint resolution of the contracting powers (Thuc. v. 48).

*Treaty of Peace.* One point deserves special notice. A provision for the restoration of cities *taken* during the war was not held to cover cities which had *capitulated*. Thus Plataea and Nisæa were not restored at the peace of Nicias (Grote, vi. 669). The treaty was commonly concluded, not as now in perpetuity, but

for a term—a long term—of years. It was confirmed by sacrifices, and oaths exchanged by the contracting parties,—the most usual and solemn oaths in each state. It was a common provision that the oaths should be periodically renewed; and that the terms of the treaty should be inscribed on columns to be erected in the respective cities, and at some place of great religious resort, such as Olympia or Delphi. See, for example, the treaty concluded by Nicias (Thuc. v. 18). The confirmation by oaths gave (according to the ideas of the Greeks) a sanction to the treaty which it would not otherwise have possessed; and it seems to have been more on account of breaking the oaths than on account of breaking the treaty itself that the Spartans regretted their infringement of the thirty years' truce; a breach of faith to which they ascribed their subsequent disaster at Pylus.

To secure the performance of the treaty stipulations, hostages were given; and so little faith had these states in each other's integrity, that lots were drawn to determine which state should be the first to make the cessions required (Thuc. v. 21). Nor can we wonder that the states had their mutual doubts and distrusts. Not to speak of the absolute breach of a treaty, the Greeks were too apt to satisfy their consciences with the *literal* observance of their obligations. See the case of Paches, who undertook to restore Hippias "safe and sound," and how he performed the promise (Thuc. iii. 34).

From this survey of the International Law of Greece, it is apparent that it had not attained the same degree of perfection as the rest of their civilization. The causes of this are to be found in the Grecian character and the political circumstances of the Grecian states.

In relation to the non-Hellenic world, the Greeks had a very slight idea of right or duty. Even if the Greeks had been willing to regard the "barbarians" as their equals, to stand with them on the same platform, this would have been of little avail. There are two parties to a bargain, and the Persians were not disposed to accept a position of equality. If the Greeks despised the Persians as ignorant, the Persians despised the Greeks as hucksters and cheats. A Persian looked on a Greek as a Spanish grandee might have looked on a burgher of Amsterdam; the Greeks looked on the Persians as a "man of culture" looks upon a Philistine or an *épiciér*.

In the inter-Hellenic world, the case was better, but still far from good. The Greeks were of the same family of nations, spoke substantially the same tongue, worshipped the same gods. We find many pleasing instances of common Hellenic feeling, as, for example, when Cimon said he would not consent to see Hellas lamed of one leg, and Athens drawing without her yoke-fellow (Sparta). But ninety years elapsed before a like appeal was



addressed to the Athenian *demos*. There were some elements of union within Hellas, but there were more of variance. A good system of international rights cannot arise except in a condition of equilibrium, and the Hellenic world was almost never in that condition. The Corinthians complained that Athens would neither remain at rest herself nor allow rest to others (*vide* Grote, vi. 3). But the reproach was not peculiar to Athens. The states of Hellas were small states. Common interests, common necessities, arose to induce or compel an alliance. The strongest member of the confederacy assumed the headship, and headship by natural process passed into empire. The weaker states thereupon yearned for their old independence. The tendency to autonomy of the Greek mind warred against the tendency to empire of the Greek circumstances. There were two great powers, Athens and Sparta, each anxious for the leadership, and each, when deprived of it, anxious to foment the elements of discord within the confederation. These were, in the most remarkable period of Grecian history, the two poles of Hellenic life, manners, sentiments, government, and power. Between these the balance of power continually oscillated. Not only were the states small; there were too many of them. No single state, no two or three states put together, were so strong as to prevent an ambitious rival from putting them in a position of inferiority if he chose to manipulate the rest of the smaller states. Add to which, that the smallness of the states produced frequent causes of war, and made the wars more destructive. Border territory is more than ordinarily fertile of disputes, and border warfare is more than ordinarily severe. But most of the Grecian states being mere strips of territory, were altogether border.

When we consider, also, the want of even such sanction as international law has now, the sanction of opinion (for how was opinion in those ancient days to be communicated?); the many causes of disturbance in rival races, rival forms of government, and the indeterminate relations of colonies and dependencies; the small size of the Grecian states, compelling the employment of citizen soldiers, who did not, like professional soldiers, fight merely in obedience to the command of the general, but fought for a war that was their own war, for which perhaps they had given their vote—fought perhaps to retaliate an injury done to their own family and possessions in the past, or to secure against such an injury in the future; when we consider all this, need we wonder that the principles of international intercourse were incompletely developed, need we wonder that wars were frequent and the usages of war mercilessly severe.

V.

## REMARKS UPON RECENT ENGLISH CASES.

*Public Policy.*—Two cases relating to questions of public policy, as bearing upon the legality of contracts and the power to enforce them, have recently been decided in the Court of Chancery. In the case of *Estcourt v. Estcourt Hop Essence Company* (10 Law Rep., Ch. Ap. 276), the plaintiffs, who were manufacturers of a substance called *Estcourt's Hop Supplement*, sought to restrain the defendant from selling a substance which he called *Hop Essence*, and which, they maintained, to be identical with their *Supplement*, and the sale of which they contended was a gross breach of faith towards them, and in violation of his agreements. They further sought to restrain him from making use of the name *Hop Essence*, as calculated to mislead the purchaser of the *Supplement*. Upon the merits, the defendant was ultimately successful, the Lord Chancellor (Cairns) and Lord Justice (Mellish) being of opinion that the plaintiffs had failed to establish their case, and that the bill ought to have been dismissed. But upon the question of costs the former judge remarked—"The case is very peculiar. The plaintiffs ask us in fact to try the issue whether the two compounds are the same, but do not reveal what is the composition of the substance which they sell. The defendants also do not offer to discover what is the composition of the substances which they profess to make. They are both entitled to practise this concealment, but they cannot ask the Court to decide an issue which cannot be satisfactorily dealt with unless the composition of the substances is known. This, however, is not all. It is impossible not to see that these substances are introduced, recommended and sold for the purpose of enabling brewers to supply to the public a liquid which they may represent to the public as being made with pure hops, when it is not in fact so made. It is also clear that this was to be done secretly, because, if the public knew what was done, they would not buy the beer so manufactured. I do not express any opinion whether the use of these compounds would come within the description of adulteration, but clearly the object was to induce the public to buy one thing when they thought they were buying another. It is not the province of this Court to protect speculations of this kind, nor ought a defendant who is engaged in a business of the same kind to obtain costs even when successful." It is somewhat difficult to see upon what principle this decision as to costs was founded. *Pacta illicita* and *contra bonos mores* have often formed the subject of judicial decision, but where the contract was deemed immoral, action was refused, and the Court did not go into the merits at all. Here the merits appear to have been fully discussed, with the effect of securing the defendant from the restraint sought to be imposed upon him by the plaintiffs, and yet, contrary to the general and well-established

rule, he could not recover his expenses. It might be true that he was engaged in the same trade as the plaintiffs, and his position as regards the public might be the same, but his position as regards this particular matter of the injunction sought to be put upon him was different. He had succeeded in his defence, and why was he denied the full benefit of that success? Such a case would seem to occupy a middle place between actions founded upon ordinary and respectable contracts, and those which from the immoral character of the obligation will at once be expelled from a court of justice.

In the case of the *Printing and Numerical Registering Company v. Sampson* (10 Law Rep. E. C. 462), an attempt was made to get rid of an agreement by which certain parties had assigned all future patent rights of a like nature to a particular patent sold, on the ground that such a patent was against public policy, as it tended to discourage inventors. It was contended that if a man knew that he had already received the price of his invention he will not make public any invention. It seems a strange and desperate argument to have advanced, but was seriously considered by Sir G. Jessel, M.R., who said, in giving judgment—"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract." Having gone on to shortly state the principle under discussion, and the extent to which it has been applied, viz., to acts against public policy, or against the rules of morality, he observes—"I should be sorry to extend the case much further. I am satisfied there is no reason for so extending it in this case. In the first place, it has been assumed that a man will not invent without pecuniary reward. Experience shows us that that must not be taken as an absolute truth. Some of the greatest inventions which have been of the most benefit to mankind have been invented by persons who have given their inventions freely to the world. Again, it is supposed that a man who has obtained money for the future products of his brain will not be ready to produce these products. That must not be assumed. Nothing is more common in intellectual pursuits than for men to sell beforehand the future intellectual product before it is made, or even conceived." Having given examples, he continues—"These examples are, to my mind, entirely repugnant to the argument that there is any public policy in prohibiting such contracts. On the contrary, public policy is the other way. It encourages the poor, needy, and struggling author or artist."

*Presumed Marriage.*—In the case of *Lyle v. Ellwood* (19 L. R., E. C. 98), a judgment was given by Vice-Chancellor Sir Charles Hall, dealing with the subject of marriage by habit and repute, so familiar to Scotch lawyers. In that case the question of importance came to be whether or not a marriage had been entered into between a certain John Ellwood and Sarah Campbell. By the law of England it would appear that the evidence required to establish a marriage depends upon the object for which the proof of marriage is required. Thus habit and repute would not be sufficient in an indictment for bigamy, although it might hold good where the marriage is not the point so directly in question. In Lyle's case, evidence of marriage was necessary in order to establish a claim on next of kin, and it consisted of a divided repute. The parties had lived in various parts of Scotland as man and wife, and had entered their children as legitimate in baptismal registers. On the other hand, proof was led that amongst the relatives and connections they had not been treated as married persons, and in Ellwood's will no provision was made for his children by Sarah Campbell. The case was treated, it may be stated, as not depending upon Scotch law. It was maintained in the argument against the marriage that a reputation such as that set up must not be divided, and Mr. Fraser was quoted, who lays down that "if the repute be divided it is no repute at all." The Vice-Chancellor, however, founding upon a number of decided cases, including that of Breadalbane, has rejected this contention. He observed, in giving judgment—"It cannot, I think, be contended that wherever there is evidence of repute on one side and on the other a marriage cannot be established. It appears to me that the Court can, and should in the present case, receive and act upon the evidence to which I have referred, as answering and outweighing the evidence that there was a repute that there had not been a marriage."

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#### THE SWISS ALLMENDS.

WE extract the following account of the Swiss common lands from the Rev. Barham Zincke's "Second Month in Switzerland:"

"Allmend means land which is held and used, as the word itself indicates, in common. In this general sense it includes common land of all kinds, whether in pasture, under forest, or in cultivation. In ordinary usage, however, it has come, without absolutely excluding the two former kinds, to signify common land under cultivation, with, in fact, almost a further restriction to common land, in which the cultivation is effected by the spade, or at all events, by the hand of man.

"It is to the old burgers in any commune that these kinds of land are common. The old burgers are, with but very few exceptions, the lineal

descendants of those who were burgers, say 200, it may have been 500, or even 1000 years ago. New burgers are those, or the descendants of those, who, having come in from other cantons, or communes, settled in the place, and who have no rights of any kind in the common land. Land may be common to all the old burgers of a commune equally: it is then said to belong to the commune. Or it may belong to sections of the old burgers, as, for instance, to those who reside in a particular hamlet; or to those who belong to a particular class of families; and these may hold it either simply for their own use, or for the promotion of some defined object: in any such cases it is said to belong to a corporation.

"A Swiss commune may be taken as the analogue of an English parish. The difference is that all the burgers, old and new, of a commune have now, generally—the old burgers, according to the old theory of the commune, had always had—an equal voice in the government and administration of the affairs of the commune, with the exception of the management and usufruct of the common property, which belongs, as it always has done, exclusively to the old burgers, either collectively, or sectionally. Residents from other cantons, or communes, are now pretty generally admitted more or less completely to participation in political rights. Formerly this was not the case: they were only tolerated. But with respect to the common property, whether of the commune or of its corporations, they are still rigidly excluded from all participation in it. For instance, there are alien families, that is to say, not descended from old burgers, which have been settled in Schwyz for two centuries, but which at this day have no share in the common lands. In order to bring an English rural parish into the same political condition as a Swiss commune, the humblest day-labourer ought to have, theoretically and practically, an equal voice with the squire in the election of the magistrates and officials of all kinds, and in the management of the Church funds, the schools, the roads, the water supply, the poor, &c., of the parish. To take an extreme supposition, the parochial assembly ought to be competent to enact that the parish should hire or buy so much land as would enable it to allow to each family a quarter, or half, of an acre of garden ground, rent free. If, for the purpose of enabling us to understand the difference, we take the Swiss commune to represent, in the political order, the natural state of things, we must then regard the English rural parish as having lost a part of its rights through the usurpations of the central government, which now appoints the magistrates, &c.; and as having had the majority of its inhabitants disfranchised by the usurpations of the rate-payers. Or if we regard the English rural parish as the perfection of local organization, we must say that the Swiss commune has usurped on the one side the legitimate powers of the central government, and on the other deprived the natural parochial depositaries of power, that is to say, the rate-payers, of their rightful privilege of being the exclusive administrators of everything in which the parish is concerned. The governing element in the idea of our parish appears to be the land, in that of the Swiss commune, the individual man.

"The commune, then, is not far from being an independent, autonomous entity, both politically and economically. What we have now to

consider is one department of its economy; that of its common lands. These, as I have already mentioned, consist of three distinct kinds; summer pastures, forests, and cultivable land. It follows from the fact of its autonomy that each commune will manage its common property very much in its own fashion; and probably there are no two communes which manage it in precisely the same fashion. But it also follows from the general similarity of their circumstances and conditions, that certain general features will pervade their management everywhere. It is with these general features that, in a notice of this kind, we are chiefly concerned.

"We will begin with the common pastures for summering cattle—the alpes. Upon this subject the Statistical Bureau of the Federal Government published, in 1868, a quarto volume of 435 pages. It is a work of very comprehensive details, and of much interest. It exhibits completely, and analyzes thoroughly, all the information the office had, up to that date, been able to collect on the subject. I will now extract from this report such leading particulars as will give the reader a general knowledge of this part of the matter, premising the observation, which the Bureau makes, that whatever errors there may be in the figures must always, for obvious reasons, be on the side of their falling short of the truth.

"The number of alpes is 4,559. Their aggregate area, in English acres, is somewhere about 2,650,000; which about equals the area of the four counties of Middlesex, Surrey, Sussex, and Kent. Their capital value, by the returns made, is 77,186,103 francs. But, as the office remarks, that probably at least a half must be added to this sum to get at the true figures, we may suppose that their aggregate capital value is, in English money, about £4,500,000. Their letting value is returned at 3,362,642 francs. The number of cow-runs is returned as 270,389. The average number of days the alpes are fed at 93. The gross revenue at 10,893,874 francs. The net revenue at 9,545,007 francs. A fairly good cow in Switzerland, I was told, is worth twenty napoleons. We will take the good and the indifferent as averaging fifteen napoleons. This will make the value of the stock yearly put on the alpes, in English money, £3,250,000. If then we put the capital value at £4,500,000, and to this add the value of the stock, and for the sake of round sums, raise the net proceeds, which we may do safely, to 12,500,000 francs, we shall have £500,000 as a net revenue on a capital of £7,750,000. This will give a little less than 7 per cent. profits for this portion of the property of the Swiss people, for 93 days. The Bureau calculates a much higher rate of profit. I say for 93 days, because though this is all they get during the year from the alpes, the cows are earning profits for them elsewhere during the rest of the year.

"To this £500,000 of profits we must add, looking at the concern from a national point of view, the support of all those who, as cowherds and cheese-makers, or as engaged in the sale at home of the cheese, or in its transportation to foreign markets, are wholly, or in part, maintained by it. No deductions need be made from this net sum, for the cows replace themselves; and whatever is expended on the pastures has been already deducted.

"We now come to the distribution of this property and of its income. Taking

	Francs
The capital value at the low and uncorrected figures of .	77,186,103
The letting . . . . .	3,362,642
The total gross revenue . . . . .	10,893,874

and distributing these several sums according to ownership, we find the respective interests of the several owners to be as follows :

	Communes	Communes and private owners jointly	Corporations	Private owners	
Capital value,	26,226,265	3,851,489	14,565,487	32,542,853	} Francs
Letting value,	1,127,355	199,270	443,803	1,592,214	
Gross revenue,	4,010,102	624,102	1,788,224	4,471,446	

"From this it would appear that the average selling value of a cow-run for an average of 93 days is 287 francs. Its average letting value 12 francs 48 cents. Its gross average revenue 40 francs 45 cents. This is according to the returns, which very much under-rate the true figures. Their respective values in the neighbourhood of populous towns rise to several times the amounts of these averages.

"The figures given will enable the reader to understand the magnitude of this part of our subject. The population of Switzerland, now somewhat over 2,500,000, has, in proportion to its numbers, a larger share in the manufacture of cotton and silk than any other in the world. Of course this, and the rapid increase in the number of travellers who every year visit the country, must have of late very much augmented the population. If, however, we divide this augmented population into families of six souls each, we shall find that the revenue accruing from communal and corporation alpes, excluding those held by private owners, is still sufficient to give yearly, for these 93 days, 10s. to every family in the country. The sum required to do the same for every family in the United Kingdom would be £2,666,666 a-year. But as we know that in Switzerland the majority of families, from living in towns and from other causes, have no share in the revenue accruing from the use of the common alpes, we must set down the average share of each actual participant as very much more than double this sum. In fact, two would be a low average for the number belonging to those who send up cows to these alpes : but if we take two as the average, this would give about £3 a year as the average net profit of each *usager*.

"The next point for consideration is, how has it come about that these common pastures form so large a feature in Swiss agronomy? The probability is that the system was once universal in Switzerland; and not among the Swiss only, but also among all other people when they were in the stage which is intermediate between the pastoral and the agricultural condition. The agricultural condition implies a precedent pastoral condition. Now as long as people are in the pastoral stage, or in the intermediate stage, when the agricultural and the pastoral are in conflict, common pasturage is inevitable. The system now in vogue in our Australian colonies is not a case to the contrary, because that belongs to

the area of capital, and takes its form from the action of capital. There is abundant evidence of this conflict, with its necessary condition, common pasturage, having once been the rule in Germany, in France, in this country, and elsewhere."

In giving an explanation of the way in which the system of common land and common pasturage was at one time prevalent all over Europe, as an illustration of his theory, the author takes the case of the Forest Cantons:

"Let us take the case of these Forest Cantons. In order to understand their position in respect of this matter, we must not limit our view to their present condition; we must go further back; our survey must include a wider range. Some centuries ago they were much secluded from the world. At that time there was, in comparison with what we now see in them, very little cultivable land reclaimed. Means of communication by wheeled carriages had not yet, in most places, been so much as thought about. The people therefore were thrown almost entirely upon their own scanty local resources. With hardly any means for getting supplies from without, with very little land for cultivating cereals, and in the days before maize and potatoes, their chief reliance was upon their cows. It is very much so even at this day. But in those days the reliance was all but unqualified. Their cows supplied them not only with a great part of their food, but also, through the surplus cheese, with tools, and everything else they were incapable of producing themselves from the singularly limited resources of their secluded valleys. The Switzer was then the parasite of the cow. There were no ways in which money could be made: there were no manufactures, and no travellers, and so there were no innkeepers to supply travellers, nor shopkeepers to supply the wants of operatives, manufacturers, and travellers; and there were none who had been educated up to the point that would enable them to go abroad to make money with which they might return to their old homes: neither they nor the world were then in a condition to admit of this. The adoption of foreign military service for a livelihood, which was a common practice at this period, was a proof of the poverty of the country, and did not at all contribute to enrich it; for the savings from their pay, brought home with them by those who returned, could never have compensated for the cost of bringing up those who through the practice were lost to the country. If the general population had not had the means for keeping cows, they would not have had the means for living. The problem, therefore, for them to solve was, How was every family to be enabled to keep cows? Under the conditions of those times the family that could not have kept cows must have ceased to exist.

"The local conditions were very peculiar. Small prairies might be formed in the valley bottoms, and by quarrying the rocks, levelling, surface-soiling, and irrigation, they might in some places be carried a little way up the mountain sides. But if the grass of these prairies were to be consumed by the cattle in the summer, there would be no provision for them in the coming winter. As, then, the prairies could not be fed in summer, what was to be done with the cattle at that season? The mountain pastures, which could not be cut for hay, enabled them to meet this difficulty. The cows of the village community might



during the summer be kept on these mountain pastures, and this would admit of the bottom and the irrigated prairies being reserved for making hay, which might support the cows in winter and spring. This, therefore, must be the plan. Every one must have the right of sending his cows up to these summer pastures. Every one in summer then would be able to devote himself to keeping up, perhaps to enlarging a little, his prairie land, and to making and storing up hay for winter. But this would depend on a sufficient amount of summer pasturage being kept common. Common property is not generally well looked after, or made the most of: but this is true of Alpine pasturage in a less degree than of other kinds of commonable land, because it does not depend for its produce upon care and labour, as a commonable cornfield or a commonable vineyard would; nor is it easily exhausted, for it is at rest throughout at least two-thirds of the year. It is very different with prairie, that is to say, made and cultivated grass land; its first formation—it is all made land—and the maintenance of its fertility sufficient for the two or three crops of hay taken yearly from it, and the making and storing up of this hay, require an amount of attention and labour it would be vain to expect as a general rule without the stimulus of private property. If common labour were attempted in a matter of this kind, most men would endeavour to throw as much as possible of the work on their neighbours; and as to improvements of the common property, what would then in theory be everybody's business, would in practice be nobody's: the labour would be both less in amount, and less enterprising. Clearly the best system with respect to the prairies was that they should be pretty generally private property. The mountain pastures were already formed. They were the gift of nature. They could not be very much improved. Under any treatment they would continue to exist. Not so with the prairies. They could not have been created without a vast amount of labour, and they could not be maintained without its continuance. And so it came to be the established rule, that the natural summer pastures should be common, and that every burger should have as many cows kept upon them in the summer as he had himself kept during the previous winter with the hay he had made from his labour-created and labour-maintained prairies; or, if as yet he had no prairies, with the dried leaves and coarse stuff he had been able to collect from the common forest.

"If these mountain pastures had been allowed to become private property in those times when the people were parasites of the cows, the few who had got hold of them would have been very rich, and those who had failed to secure a share in them would have been quite starved out. They would not have been able to have kept cows through the winter, because in the summer they would have been obliged to put them on their little bits of prairie ground, and so could not have reserved their produce for winter.

"We now come to the second part of the common property of these Cantons—the forests. Under the conditions of the past it was as necessary that there should have been common forests as it was that there should have been common summer pastures. Wood, with the exception, here and there, of turf, and which followed the same rules, was in Switzerland the only fuel. In times when men did not live much, or at

all, on wages, and wood was the only fuel, it was necessary that all the members of the community should have the right of taking so much as would supply their absolute wants from the contiguous forest. This also, therefore, must, at all events so far, remain common property. That it should have been so was quite imperative in Switzerland, on account of the length and the severity of the winter. If any members of the community had been excluded from the right of fuel, they would have died of cold. Suppose that these forests had been allowed to become private property: two evil consequences would have ensued; a large part of the existing population would forthwith have been deprived of the means of obtaining fuel; and as a private owner might do with his own what he pleased, his necessities, or greed, or bad judgment, might bring him to cut down, at one time, a large portion of the forest, or might prevent his taking the care necessary for maintaining it in a serviceable condition for the generations that would follow him. These difficulties were overcome by keeping the forest in the hands of the community, and distributing, on a plan which would be fair to all, the amount of fuel that would be necessary for each. It thus became the interest of all to see that the forests were not wastefully used, and were properly maintained; and a regular supply, which was the great point, of what was indispensable was secured for all.

"The rule generally observed in the distribution of the produce of the common forests was, that each family should have an allowance of fuel, and of timber for repairs, in proportion to the size of his dwelling-house and byre; so many solid klafters for the former, and so many hewn timber trees, generally fir, for the latter. In the days before accumulations of capital, when, through the condition of each being mainly the result of his own industry and actual manual labour, all were kept pretty much on an equality, this method of distribution was fair enough. Its principle was analogous to that which was observed in the use of the common pastures.

"Under the circumstances of time and place the maintenance of common property in the forests was a matter of life and death. In these valleys at that time there were no ways of earning the means for buying fuel. The people had in summer to be attending, each to his little bit of prairie land, to his hay-making, and to his little plot of corn; and in winter he must still be at home, looking after and tending to his cows, and doing the many things requisite for the maintenance of his family; and which, under the circumstances of the time and place, would not have been done at all if not done by himself.

"What has now been said about the mountain pasture and fuel fully explains the disabilities laid on residents who had come in from other cantons or communes. They were excluded from political rights, and from participation in the common property, not out of any mean and unreasonable jealousy, but because the common property was barely sufficient for the existing burgers—population always increases up to, it might be more truly said down to, the means of subsistence—and increase of numbers would have destroyed the action and benefits of the system: the only system then and there possible.

"We still have to consider a third kind of commonable land—the garden-ground. This was, originally, as necessary as the other two kinds. It would amount for each to shares of an acre or two. It com-

pleted the support of the family. It was an indispensable supplement to the cows and the fuel. And even in these times, when money can be earned in many ways, the quarter, or half, of an acre, in some places still the whole acre, which can be assigned to each member of the commune, has some advantages. It enables the family to secure a sufficient supply of cabbages, onions, haricots, flax, hemp, potatoes, and occasionally, a serviceable amount of wheat or maize. Formerly there was no other way for the household to procure these articles: though, indeed, in these days, this obvious advantage is sometimes counterbalanced by greater, but less obvious disadvantages. The old rule was that every commune should have a certain amount of *terre laborable*; and that this should, at stated periods, say every year, every five, ten, or twenty years, as might be the local arrangement, be reportioned among those who would themselves cultivate their lots. The community must have hands and hearts to protect it, indeed even to enable it to be a community; and these hands and hearts must have the means of living; and if all the *terre laborable* had been allowed to fall into the condition of private property, many would have been deprived of a necessary ingredient in the means of living. And here again, if *Beisassen* had been admitted to a participation in the communal garden ground, the aim and object of the system would, so far as that went, have been defeated. In many, probably in all communes, it was the rule that new-comers might purchase the position and rights of burgers, when, but only when, the old burgers were in favour, unanimously, of their admission. This wise requirement of unanimity upon the question of the admission of a new burger, secured the community against the action of a cause, which, if unrestricted, would certainly and rapidly have reduced the severalties of its members in this, and all other kinds of their common property, to insufficiently small dimensions. It is true that they have at last been overtaken by this inconvenience; but it has been brought about by the action of a natural cause which could not have been met and obviated in any way: for it has been the result of an increase of population; and that increase of population has been the result of an increase of wealth; which again, in turn, was the result of an increase of variety in the ways opened for obtaining a living. Our porter from Meirengen to Brieg, Jean Ott, a burger of Im Hof, has ten children. He obtains his livelihood by carrying travellers' knapsacks. Those knapsacks, therefore, have ultimately been the cause of the existence of the ten children. The boys will all be burgers of Im Hof. Their existence will lessen the value of the severalties of the common property of Im Hof. In this way, everywhere, the severalties are being so reduced as to be no longer sufficient for the support of families. Thus they become only prophylactics, if that, against pauperism.

"The four parts then of the system we have been considering, the common summer pastures, the reclaimed appropriated prairies, the common forest for fuel, and for building and repairs, and the common *terre laborable*, hung together inseparably. Each was necessary under the circumstances of the character and natural formation of the country; and of the absence of accumulations of capital, and of anything else to give employment, the existence of which would have meant that there were other sources than land for supporting life. The Switzer—that is the governing fact—was the parasite of the cow. He could not

have existed without it. But he could not have kept cows without their having been taken off his hands during the summer by their maintenance on the common mountain pastures. This was necessary for enabling him to form and maintain the prairie land, and to make hay from it. Otherwise the cows could not have been supported in the winter. But these prairies could not, as a general rule, have been formed without the stimulus of private property. Many families could not have existed unless they had had a supply of fuel from the common forest. An assured amount of garden-ground was almost as necessary as an assured amount of fuel.

"It will help us to understand how this system acted, and why it acted as it did, if we observe how the introduction of the new conditions has affected it. Switzerland, which was for many ages the poorest country in Europe, is rapidly progressing towards becoming, in proportion to the amount of its population, one of the richest.

"The influx of wealth has, to a great extent, rendered the old system of common pasturage both unnecessary and unfair. While it has been abrogating its necessity, it has been reversing its action. In these days a man keeps an hotel, or a shop; has a bank, or a factory; or in some way or other makes a good deal of money: perhaps it was made abroad, and he has returned home with it. He will now keep a dozen, he may even keep two dozen cows. He will be able to do this, because he will keep them out of the profits of his business, or from the interest of accumulated capital; and not, as was alone possible formerly, by his own labour and that of his family. If he were reduced to that means of keeping them, their number would be reduced to four or five. And this rich man is a burger, and therefore he is entitled to send them all up to the common pastures. If he have more than two dozen, all still may be sent. At the other extremity of society many are called into existence by the existence of the rich. These will be supported by wages. And these wages they will not get unless they work regularly. But if they work regularly for wages, they will not be able to spend the summer in collecting winter provender for cows. Nor in winter, if they had provender, could they devote their time to cows. These men, therefore, though burgers, equally with the rich, will be unable to turn their rights in the common pastures to account. Their rights thus fall into abeyance. And in many places the population has so increased that there is no longer common pasturage enough for those who do keep cows. Some half-dozen rich burgers, then, may alone have more cows than the pastures, which remain common, would be able to maintain, or an increase in the number of burgers who are able to keep a few cows each, may have brought things to the same point. And either of these cases may be coincident with the inability of a large proportion of the burgers to keep any cows at all. Increase, then, of wealth, and consequent increase of population, have altogether altered the action and defeated the purpose of the old system. In those communes in which the rich are in the majority—a state of society which, strange to say, does exist in some—the old rule is rigidly maintained: every burger is still entitled to send up to the common pastures all the cows he kept through the winter. In places, however, where wealth has so increased the number of cows that there is no longer sufficient common pasturage for all, each burger sends up a *pro rata* proportion of his herd, say a third, or a half. In such cases, by the very maintenance, as far as possible, of the old, originally fair rule, the poor,

some partially, some utterly, are excluded from the use of their property. In many places it has become the practice, and it is one which the force of circumstances is rapidly extending, to let the common pastures. The question then arises, of what is to be done with the proceeds? In the case of the communal alpes they may be applied to the payment of local rates; or they may be divided among the burgers, who may receive each an equal amount, or an amount proportionate to the number either of his cows, or of his family.

"But to each of these methods, and I believe to every conceivable method of appropriating the proceeds, valid objections may be made. If they go in reduction, or whole payment, of rates for schools, roads, churches, fountains, police, &c., then the rich are eased in a far greater degree than the poor; who, according to the original principle of the system, have an equal right in the common property with the rich; its use having been, at the time of its institution, so regulated—this was possible under the circumstances of those times—as to enable all to participate in it pretty equally. Riches have supervened, and have, as things now are, made this impossible. But as those who are now poor may some day become rich, their rights are still, contingently, equal to those of the rich. Or, if the proceeds are divided among the *usagers* in equal amounts, or in proportion to the number of cows owned, or of the family—and these methods of distribution are often resorted to in places where the population has quite outgrown the common pastures—the benefit to each burger will be very small. In the equal *per capita* distributions idleness will always be rewarded, without industry being ever encouraged. And in the proportionate distributions it will generally happen that those who want help most will get the least, and those who want it least will get the most; which difficulty will be further aggravated by the fact, that in these days many of those who want it most are least deserving of it. Again, all these methods of distribution exclude the new burgers; and such exclusions are in direct contradiction to the ideas, the sentiments, and the requirements of modern societies.

"In those cases in which common pastures belong to sections of the burgers of a commune, that is to say, to corporations, for instance, to the burgers of a particular hamlet, or to certain families, either with or without a definite object to be promoted by the use, or the proceeds, of the common property, or in some way or other by those who hold it, it is found that the same disturbing action, as in the case of the communal property, though not quite to the same degree, has been introduced by the influx of riches. Some get rich, and some get poor; which in the case of these corporations also, renders the system unmeaning, and even noxious. And riches lead to an increase of population which renders the share of each corporator of little value.

"The fact is, that the old system is utterly inapplicable to the new conditions into which society has advanced. It was intended for that state of things, modified by the strong peculiarities of Switzerland, in which land is the only means of supporting life. Life may now be supported by capital, either invested or employed, a means which admits of indefinite extension, or by the labour and skill of those whom capital employs. This has deprived the old system of its character and utility; and even in many places made its action prejudicial to the interests both of individuals and of society. Its object—that of supporting life—can now be better attained by other arrangements, and also by other means."

## Review.

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*Lawyers and Law Reform : an Address to the Faculty of Procurators of Glasgow.* By ANDERSON KIRKWOOD, LL.D., F.R.S.E., on the occasion of his election as Dean. Glasgow: J. & A. F. Strathern. 1875.

THIS is an address given to the Faculty of Procurators in Glasgow, by the learned, accomplished, and experienced gentleman whom that body have recently elected as their Dean in succession to Dr. Adam Paterson. The main subject of the address is the law reforms which have been made within the last thirty years. Dr. Kirkwood begins his account of these by referring, with pardonable pride, to the fact that most of these improvements have been the work of lawyers, and that in considering proposals for alteration in the forms of process and the methods of conveyancing, lawyers have in a high spirit given to personal considerations a quite subordinate place, and have regarded the public advantage as the paramount consideration. Our readers may remember that some little time ago, in giving a *résumé* of an article in the *Quarterly Review* on "the Judicial Investigation of Truth," we ventured to deny the statement that a professional class must always be the slave of custom, and to repudiate the insinuation, that if we wish such alterations in the law as may bring it into harmony with the principles of justice, we must trust to the lay mind. Dr. Anderson Kirkwood very properly points out that it is to lawyers that the public have trusted to effect improvements on the law, and it is to lawyers that the public must trust, just because other people have not the requisite knowledge.

In treating of recent legal reforms, Dr. Kirkwood begins with Court procedure, and appropriately enough commences that part of his subject with the Sheriff Court. It is obvious that the alterations made on the procedure of the Supreme Court by the Act of 1868 must and ought to be followed, and should before this have been followed by similar alterations on the procedure in the Inferior Court. At present the system of judicial procedure is a little lop-sided. For example, we may refer to cases where the Sheriff refused to allow an amendment of the record, and, on appeal, the Court of Session held he was quite right, but that the Court had right to do so; and they exercised the right. "It is delay," says Dr. Kirkwood, "which is now the greatest drawback in Sheriff Courts, particularly in our own Sheriff Court, where the amount of ordinary civil business is so great that it cannot be overtaken by the present underpaid staff of judges, burdened and distracted as they are with Criminal Courts, Small-Debt Courts, Bankruptcy Examinations, Prisoners' Declarations, and a multitude of

other statutory duties, which never come to a halt, but go on increasing from year to year."

Passing from the Sheriff Courts to the Court of Session, the author refers to "the care and expedition with which causes are there now so satisfactorily conducted." "This," he says, "is due to the reforms in the Court of Session procedure, introduced by the Acts of 1850, 1866, and 1868. The record is thereby simplified,—all orders for lodging papers are inflexible as to the time allowed,—proofs in most cases are taken before the Lord Ordinary, and taken in shorthand,—the diets for leading proofs, whether before the Lord Ordinary or a jury, are peremptory and continuous,—and the discussion and decision usually follow immediately upon the conclusion of the evidence. In all these respects there is great improvement. Provision also is made for 'special cases,' by which, if the parties are agreed upon the facts, they can obtain from the Inner House a speedy judgment on the law; and, where the decision depends on English or Irish law, the means are provided (by an Act passed in 1859) of ascertaining that law from a superior Court in England or Ireland, instead of relying, as formerly, on a mere opinion of English or Irish counsel. We have every reason therefore now to uphold the Court of Session, and have accordingly, in the public interest, aided the legislation for its reforms, although we could not personally be thereby benefited."

The delay in the leading Sheriff Courts is, we suspect, due not merely to the inadequate staff of Sheriffs-Substitute. It is due to the want of the provision for peremptory diets which exists in the Court of Session. That papers must be lodged,—that a record must be closed at a certain date,—that proofs must be taken with a short interval of preparation, and that the most inexperienced counsel has sometimes to debate a case of which he knew nothing the day before,—all this involves occasionally a great strain on the energies of counsel and agent. But still the work must be done; and the work is done, and the public reap the benefit. A similar provision for peremptoriness of diets introduced into the procedure of the Sheriff Courts would put an end to the delay so much complained of. At present the delays in the Sheriff Courts "for the convenience of parties" are simply frightful. We have seen a Sheriff Court case for somewhere about £30 in which there were about seventy interlocutors, most of which were merely continuations of the proof or debate.

As closely connected with Court procedure, Dr. Kirkwood next refers to the series of Evidence Acts which removed the numerous and absurd disqualifications of witnesses. He hopes "that the next improvement in this branch of the law will be to admit the competency of a panel's evidence at his own criminal trial, instead of exacting from him, when an unprotected prisoner, a *quasi* judicial declaration." The suggested alteration may be for the protection of the public interest, but we do not know that it will

be for the "protection" of criminals, at least of any but the most experienced ones,—the Deans of their profession.

A short account is next given of the alterations in our system of conveyancing, the simplification of titles, and so on.

Turning from forms of civil procedure and simplified titles, the author reviews what strikes the public mind more forcibly, changes in known and familiar laws,—the general laws regulating the rights of individuals in their successional, their domestic, or their mercantile relations. The Intestate Succession Act of 1855 (Mr. Dunlop's Act) is referred to as enlarging the rights of women. In one respect it does. But in one respect it diminishes them, and we doubt very much if the diminution was a wise one. Before the passing of that Act the representatives of a wife who predeceased her husband had a right to a share of the goods in communion. Now they have none whatever. The pendulum has swung violently round to the other side. The former law operated unjustly in some cases. The present law operates unjustly in some cases too. Suppose a woman with a good deal of money marries a man with nothing; if she predeceases him the whole money goes to the lucky widower. Probably the just provision would be one intermediate between that of the old law and that of the new. In construing destinations of conjunct fee and liferent, consideration is taken of the source from which the estate comes; and perhaps a similar consideration should be taken into account in determining the rights of the representatives of a predeceasing wife. In commenting on other provisions of the same Act the author recommends that the provision introducing representation in intestate moveable succession should be extended to the case of *legitim*. There does not seem any reason why it should not, and we suspect it was by a mere slip that the Act of 1855 did not apply to *legitim*;—another illustration of the care with which Acts of Parliament are drawn. But we forget that a high authority has recently intimated his disapproval of criticism on Acts of Parliament (Parliament being a thing which must be worshipped as a *fetich*); and we cannot just now plead the excuse of want of ventilation.

Referring to the gradual extinction by snippets of the law of entail, the author says: "Judging from indications cropping up here and there in Parliament and elsewhere, we may look, at no distant date, for an enlargement, in the case of *heritable* property, of the powers of entailed proprietors, so as to give them more of the rights of fiars than of liferenters." The anticipation has been realised, although perhaps not to its full extent.

In conclusion, the new Dean of the Faculty of Procurators in Glasgow refers in a wise and estimable spirit to the influence for good which members of the legal profession may exercise. "One source," he says, "of that influence is the intimate knowledge we possess of all our clients' affairs. They consult us in every important transaction of their life, whether prosperous or adverse,



and whether relating to family or business. Thus we are familiar with their marriage settlements, their wills, their partnerships, their ventures at home and abroad, their investments, their family trusts, their disputes and litigations, their benefactions, public and private, and their whole affairs. Such knowledge of itself produces great influence, and, if it be combined with calm and impartial judgment, with perfect integrity, and with the reticence of a father confessor, there is a confidence created which it is impossible to exaggerate. Hence it is that we are enabled to exert a beneficial influence on a community. And we can always do so by smoothing down family misunderstandings, restoring good feeling among friends, allaying the irritation of patrimonial differences, promoting compromises, and (if suitable) arbitrations, in business disputes, and, where litigation is necessary, so conducting it as to leave no room for hostility or alienation when it is over. These are the ways in which we can be useful."

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### The Month.

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*The Vacant Judgeship.*—The vacancy on the Bench created by the lamented death of the late Lord Mackenzie has not yet been filled up. From the delay that has taken place in filling it up, an impression has got abroad that the vacancy is not to be filled up. The impression is a mistaken one. It may be that a Judgeship should be suppressed, or might with safety be suppressed; but no Government can with safety contravene the provisions of an Act of Parliament. We believe that at the close of the Summer Session of the Court, Lord Advocate Gordon will take the vacant gown. Having recently read a review in the *Scotsman* newspaper of a book by Mr. Alfred Smee, F.R.S., we have come to the conclusion that it does not matter very much who is to be appointed to the vacant seat on the Bench. The eminent author observes:—"Perhaps there no class of men who more earnestly desire to do right than our judges. They pride themselves on their strict impartiality, and do everything in their power to do absolute justice. Yet how often are their decisions reversed! What is right is wrong before another. What is right to-day is wrong to-morrow; and how often a disagreement occurs between several, when a case is submitted to their conjoined wisdom. The remedy for this is to have their minds thoroughly imbued with the principles which should govern every case, as the mathematician has laws in his mind when he calculates the time of an eclipse, which has occurred in a period which is past, or which may occur in some time in the future." To remedy this lamentable state of judicial discordance, the able author of the book has been good enough to invent a pair of machines capable of performing the

most important functions of the human mind, and without that liability to error to which every mind is subject (excepting of course Pio Nono, and one or two people whom we know, but whom the general public do not know). Mr. Smee proposes, in fact, to revolutionize the whole judicial system of the civilized world. He says,—“By using the relational and differential machines together, we are enabled to obtain the bearing of any facts, or to arrive at any conclusion to which the mind by itself is competent. From any definite number of premisses, the correct answer may be obtained by a process imitating, as near as possible, the natural process of thought. It would be a great boon to the community if the judges, notwithstanding their high integrity, would use such an instrument, as then what one calls right would not be called by a second wrong. A mechanical judge would be a boon to the whole civilized world.”

The author of the book does not mention the price of his mechanical judge.

*Exclusion of Evidence of the Accused in Criminal Cases.*—A paper on this subject was read before the Statistical Society of Ireland on the 18th inst. by Mr. John O'Hagan, Q.C. He said that his subject was the retention in the criminal code of a principle of exclusion which had been obliterated from the civil code. Even already an inroad had been made upon the system by Mr. Plimsoll's Act of 1871. It made it a misdemeanour to send to sea an unseaworthy ship, and in any indictment under that Act the accused was permitted, for the purpose of proving circumstances of excuse, to give evidence like any other witness. Why should there not be a similar enactment with respect to all offences? An innocent man, of unblemished character, was accused of crime: he desired to explain on oath the circumstances of suspicion against him, and offered, suppose, in addition, the testimony of his wife, who possibly might alone be cognizant of the most vital facts. Neither was permitted to be sworn. It was left to the prisoner's counsel to suggest possibilities of explanation—possibilities of innocence—to create darkness instead of dispelling it—to harp upon the great principle of the benefit of the doubt, and if he should succeed in obtaining an acquittal, to set his client free, rather as a man not clearly proved guilty than shown to be innocent. But he might not succeed, and the innocent might suffer. Two or three instances occurred to his recollection. One was that of a clergyman in England who was convicted of a fearful crime on the evidence of two little girls attending his wife's school. He loudly protested his innocence, and his case was tried again in the form of an indictment of the girls for perjury. They were convicted, and he was pardoned and set free. Here were two juries coming to directly opposite conclusions, neither of whom heard the evidence upon which the other decided. He had been told by one of the ablest and most experienced of

Crown prosecutors now on the bench that in his opinion it was a great mistake to suppose that wrongful convictions did not from time to time take place, which, in all probability, would not have taken place if the prisoner had been examined as a witness. Nowhere had the unreasonableness of the present law come home to him as forcibly as in trials resulting from faction fights. An affray took place between two factions or parties coming home from a fair. Informations and cross-informations were sworn, with the very object of including amongst the accused such individuals as could give evidence for the defence. The "Ryans," let him say, were first put on their trial. Their opponents, the "Carrolls," came to the table one after another, and told one side of the story. When their evidence closed the case closed. The jury retired to consider their verdict, and then what occurred?—the Carrolls all walked into the dock to take their trial before a new jury, and the Ryans walked out of the dock for a time in order to be examined as witnesses. The new jury heard a new case. Thus each jury was forced to decide upon one-sided evidence. He could remember but three grounds on which the proposed change was resisted. It was said that to permit the accused to be examined as witnesses would afford opportunities for perjury, but the present conception of a fair trial was to hear everybody who had anything relevant to say—to let the evidence be sifted to the utmost—to let the interest of the witnesses, as well as their passions, prepossessions, and antipathies be taken into account, and a conclusion arrived at with at least all possible means for forming it. The end of a trial, civil or criminal, was the attainment of truth. If the Legislature should come to the conclusion that truth would be best elicited by hearing every one, and if in the course of the inquiry any one should be tempted by personal interest to swear falsely, the guilt would be neither upon the Legislature who made the law, nor upon the judge who administered it, but solely upon him who thus abused it. Again, it was said that the proposed change would be fatal to any chance of a prisoner's escape; because, if he tendered himself for examination, he would be certain to be broken down, and his case destroyed: but this objection he chiefly heard from lawyers who took a professional pride in securing acquittals. Did any one seriously think that an innocent person would be more likely to be found guilty by being examined? He remembered citing elsewhere a saying of Mr. Crabbe Robinson, who, having attentively studied French criminal procedure, said he had come to the conclusion that if he were a guilty man he would rather be tried in England, and if he were an innocent man he would rather be tried in France. He (Mr. O'Hagan) did not propose to introduce the French mode of examining the prisoner here. All that was sought could be effected by three lines of an Act of Parliament, declaring that a person accused of an offence might give evidence like any other witness. That the result would be to increase the number of the convictions of the guilty

was extremely likely, and in that respect it would be a great gain to the public. A third objection was that the proposed change was contrary to the spirit of the British Constitution. He need not lay much stress upon that. If by the British Constitution was meant the criminal code and procedure of England, he appealed to any one familiar with the State trials to say whether, until reformed in modern times, it did not present a mass of iniquitous absurdity. Having mentioned several instances of this, the learned gentleman said, in conclusion, that before the reforms in the laws of evidence, just the same arguments drawn from liability to perjury and the like which were now urged against the admission of prisoners to give evidence, were pressed against the examination of the parties. He contended there was no reason why the law should not be made more symmetrical and coherent.

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### Obituary.

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MR. ALEXANDER INGRAM, Solicitor, Stranraer, died at Malvern last month, at the comparatively early age of forty-eight. He had been evidently in failing health for a considerable time past, and his death has not been without forewarning to the many friends with whom his numerous avocations brought him into contact. There are few men in Scotland who had so many and varied occupations, or who filled so many public offices. He had an important practice as a Solicitor in Stranraer; he was agent for the Clydesdale Bank there; he was Clerk of the Peace for one of the divisions of Wigtownshire; he was tenant of the large farm of Shalloch; he was Provost of Stranraer, to which office he had been more than once elected; he was Chairman of the Stranraer School Board; and, being Political Agent in the Stranraer Burghs to Lord-Advocate Young, he was appointed to the office of Circuit Clerk of Justiciary. In the latter capacity he was brought into contact with the members of the Junior Bar going upon Circuit, all of whom, we are sure, must have read with regret the intelligence of the loss of one whom they knew to be a clear-headed and sagacious man of business, and an honourable, courteous, kindly, and in all respects an estimable man.

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### Notes of English, American, and Colonial Cases.

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**APPORTIONMENT.**—*Tenant for life—Apportionment of dividends—Specific legacy.*  
 Testator bequeathed £5,000 stock in a canal company to trustees, to pay the dividends to his wife for life, and afterwards to sink into his residuary estate.—*Held*, that the dividends were apportionable.—*Whitehead v. Whitehead* (Law Rep. 18, Eq. 528) corrected. *Pollock v. Pollock*, 44 L. J. Rep., Ch. 168.

**PACTUM ILLICITUM.**—*Agreement between bidders on public contract.*—A contract for making a public improvement was about to be let to the lowest and best bidder. A, who had filed his bid, and B, who was about to file his bid, entered into an agreement to become partners in the doing of the work, in the event the contract should be awarded to either of them, and further agreed that the contract so awarded should inure to the benefit of the firm. This agreement was not intended to influence the bid of either party. B, to whom the work was afterward awarded on his bid, refused to perform the work in partnership with A, and assigned the contract for the work to a stranger for a valuable consideration, which he received:—*Held*, 1. The agreement between A and B was mutual, and the undertaking of each was a sufficient consideration to support the undertaking of the other. 2. The agreement was not void as against the public policy, it not appearing that the intent, effect or necessary tendency of the contract was to stifle fair competition at the letting. 3. A was entitled to demand from B one-half the profits received on assignment.—*Breslin v. Brown*, 24 Ohio St., 565.

**PARTNERSHIP.**—*Dissolution—Business continued under old name—Liability of outgoing partner.*—A copartnership, consisting of a father and son, carried on business under the firm name of H. S. & Co. H. S., the father, who was a man of means, and gave the firm its credit, sold his interest in the firm to his partner and another son, who, by agreement with the father, continued the business as theretofore in the firm name of H. S. & Co. In an action by a creditor who had trusted the new firm on the faith that the father was a member:—*Held*, that the father, by allowing his name to be so used, held himself out as a member of the new firm, and was thereby estopped from denying the fact, although publication had been made of the dissolution of the old and the formation of the new firm, of which the creditor had, in fact, no notice.—*Speer v. Bishop*, 24 Ohio St., 598.

**NEGLIGENCE.**—*Railway Company—Insurance—Damages.*—In an action for injuries caused by defts.' negligence, a sum received by the plaintiff on an accidental insurance policy cannot be taken into account in reduction of damages.—*Braddurn v. The Great Western Rail. Co.* L. R., 10 Ex. 1.

## The Scottish Law Magazine and Sheriff Court Reporter.

### SHERIFF COURT OF PERTHSHIRE.

Sheriffs ADAM and BARCLAY.

A. v. B.—19th March 1875.

*Custody of an illegitimate child.*—The parents of an illegitimate child agreed to place the child in the custody of a third party, mutually paying for the aliment. The putative father obtained its custody, and the intermediate party got it back clandestinely. The father brought an action for restoration of the child. He insisted that the child should be first restored to him, and that its future custody could only be decided in the Court of Session, and the Sheriff had no jurisdiction in such cases. The mother was called as a party, and entered appearance, and after proof the following interlocutors were pronounced:—

“*Perth*, 19th March 1875.—Having heard parties' procurators, and made avizandum with the process, proofs, and debate, Finds, as matters of fact—(1) On 1st December 1869 the compeerer, Elizabeth Bremner, now Carmichael, brought forth a female child in illegitimacy, of which the pursuer admitted being the father, and which child is now about the age of five years; (2) Soon

after the birth of the child, the pursuer called on the mother of the child, and the parties then mutually agreed that the mother should not nurse their said child, but that the pursuer should provide a nurse for the same; (3) The mother having employed Mr. Henry Whyte, solicitor, Perth, to enforce her claims against the pursuer in reference to wages as his servant, and otherwise in reference to the said child, Mr. Whyte, acting mutually for the parties, made an arrangement with the defr. and his wife to nurse the said child, and the same was soon after placed in their custody, the pursuer and the mother contributing for her support, which they accordingly did to the defender; (4) The said child continued in the custody of the defender and his wife until for a period of a few weeks in 1872, during which, without the consent of the mother, it was placed by the pursuer in the custody of another party, but shortly thereafter, under a new agreement, it was restored to the defr. and his wife; (5) The said child remained in the said custody until about the 24th April 1874, when the pursuer, without the knowledge and consent of the mother, obtained the said child from the defr. and his wife, on the promise of her being returned on the Friday of the week following; (6) The pursuer having failed to restore the child to the custody of the defr. and his wife, they, accompanied by their daughter, went on the Saturday of the following week to the pursuer's residence, and without his consent took back the child to their residence; (7) It is not proved that the compeerer, the mother of the child, ever agreed that her child should be given to the pursuer to be brought up in his house, or renounced her right of custody during the term recognised by law for the continuance of the same, and she now judicially demands, and has in point of fact obtained that custody. Applying the law to the facts so found, Finds the pursuer has at present no right to the custody and upbringing of the child: Therefore assolizies the defr. from the conclusions of the action, reserving all questions of aliment and right to maintain any question as to the permanent custody and upbringing of the child in the competent court: Finds the defr. and compeerer entitled to costs, subject to modification of one-fourth in respect of the facts found under the fifth article of the foregoing interlocutor: Remits to the Auditor to tax the account thereof, and decerns.

HUGH BARCLAY.

"*Note.*—Up to a certain age, the mother of a bastard has the custody of her child, either personally or by a person selected by her. She is entitled to enforce this right, and it is competent for the Sheriff to protect and enforce the same. The father may have a right of control indirectly, through payment of the aliment, and to see to the proper care or custody of his child. With reference to the permanent custody of the child, the Supreme Court alone can regulate such. The proof undoubtedly goes no farther than that the mother agreed from necessity to devolve the nursing on a third party, and afterwards both parents allowed the custody to continue with the nurse, the defr.'s wife. The mother could at any time claim the child to herself, but the father, even though she had renounced her natural rights, could not make such a claim. The proof as to the more recent shifting of the child is conflicting; but to the S.-S. it appears that the pursuer improperly obtained the child from the defender without consent of the mother, and on a promise to restore the child next week. It is equally plain that the defra., being deprived of the custody of the child, recovered her without the pursuer's consent and in an improper manner, though certainly under no small circumstances of excuse.

H. B."

On an appeal, the Sheriff (Adam) affirmed the above judgment, adding the following note:—

"*Note.*—The child in question, which is about six years of age, is now in the custody of its mother, who has compared and been made a party to this process. There is no evidence that she agreed to give up her right to the custody of her child. The arrangement with the petr., whereby the child was given to the respt.'s wife, was clearly of a temporary character, and not such as to debar her from resuming the custody of the child, if so advised. She has now done so, and in these circumstances the prayer of the petition must be

refused. The Sheriff has doubted whether the resp<sup>t</sup>. should have been allowed any expenses, but he has resolved not to alter the interlocutor in that respect. He will not, however, be allowed the expenses of the appeal. J. A."

*Liability of servants for death of a horse.*—The facts are set forth in the annexed interlocutor :—

"Perth, 10th April 1875.—Having heard parties' procurators, and made avizandum with the process, proofs, and debate: Finds, as matters of fact—(1) That on the day libelled the defr. was in charge of a black horse, the property of the pursuer, and whilst placing it in the stable, did catch the said animal by the nostrils, and when so held did kick it once or more on the side, whereby its diaphragm was ruptured, and it instantly died; (2) The value of the horse is proved to have been of the value claimed. Therefore, in law, finds the defr. liable in said sum, in consequence of his culpably occasioning the death of said horse, to the loss and damage of the pursuer, decerns in terms of the summons: Finds the defr. liable in expenses, allows an account thereof to be lodged, and remits the same to the Auditor to tax, and decerns.

"HUGH BARCLAY.

"*Note.*—The horse was under the charge of the defr. at the time of its death, and was proved to have been in vigorous health. It died instantaneously, and it is proved by skilled witnesses that the cause of death was violence. No one had the opportunity of using violence at the time but the defr. If the death is thus fixed on the defr., it is a secondary question what was the kind and amount of the violence. The defr. appears first to have been in fault in not having a halter attached to the horse when taken to the watering-place. In consequence of this the horse took its pleasure, and ran about at large until caught. "That it received its death-blow by this exertion or coming in contact with some object, as argued by the defr.'s solicitor, is excluded by the nature of the injury and the position of the internal marks. It is clear that the defr., in consequence of the vagaries of the horse, lost command of his temper, and sought to punish the animal. The beating on its posteriors by a barrel-stave could not have occasioned death; not even the blows on the head. But on the proof, the holding it by the nostrils, and intercepting its free breathing for any length of time, could not have been devoid from danger. It may be not uncommon momentarily to seize a horse in this way to overcome its obstinacy. But here it is proved that, whilst so held by the defr., he kicked the animal on the side more than once. As shown by the skilled persons, the kicks would of necessity be received on the very region of the vital power. The horse being heated by its previous exertions, and its breathing intercepted, there appears no wonder of the rupture and instant death. It might have been well had the professional witnesses seen the marks underneath the skin, and that this very important point of real evidence had not rested solely on one so much less skilled in such matters.

"The S.-S., considering the age of the animal and the price originally paid for it several years ago by the pursuer, wished he could, under the circumstances so hard for the defr., have modified the amount, but, bound to decide on the evidence, and there being none on the opposite side, he is compelled to award what is established to be the value of the horse at the time of its unfortunate death. H. R."

On appeal, the Sheriff (Adam) affirmed the above judgment. The following is the note to his interlocutor :—

"*Note.*—The Sheriff has no doubt upon the evidence that the pursuer's horse died in consequence of the culpable violence used to it by the defr. He is responsible for the consequences of his acts, and is therefore liable for the value of the horse, which is proved to have been of the value claimed. J. A."

C. v. D.—10th May 1875.

**Jurisdiction.**—An action was brought for aliment of a child begotten and born in Crieff. The defr. had left, and settled in London as a commercial traveller. On a visit to Crieff, he was cited personally. He pled no jurisdiction, being now resident in England. On a preliminary record, the following interlocutor was pronounced :—

“*Perth, 10th May 1875.*—Having heard parties’ procurators at a prior diet, and made avizandum with the preliminary record, for the reasons assigned in the annexed note, repels the defr.’s preliminary plea, and sustains the jurisdiction of this court : Finds the defr. liable in the expense of this record, and orders the case to be enrolled, that a record may be made up on the merits.

“HUGH BARCLAY.

“*Note.*—It is admitted that the defr. is native born of Scotland, and though by itself such does not now sustain jurisdiction, yet it always adds strength to other grounds. The pursuer alleges that the child—the aliment of which is the subject of this action—was conceived and born within this jurisdiction ; finally, the defr. was personally cited therein. On the other hand, it is alleged that the defr. recently has removed to London, and is engaged as a mercantile traveller to an establishment there. Had the defr. been for a length of time in business in London there might have been some semblance of foundation in the plea ; but as it is, there is no ground whatever to send the pursuer to the English courts, where the expense of probation must of necessity be ruinous to both parties. The defr. founded on the case, 9th Feb. 1860, *Crichton*. That case certainly in many respects is similar to the present, with the important addition, that in this case the child was not only born, but is averred to have been conceived, within this jurisdiction. This important additional fact of *delict* brings the present case precisely under the subsequent decision of *Kermack*, 7th July 1871, where the fact of the delict of slander having been committed within the jurisdiction was held sufficient to support the action. The Lord President clearly indicated that, in the case of *Crichton*, had the child been begotten as well as born in Dundee, the decision would have been otherwise. To the first act both parties are participant ; to the last, the mother has the sole choice, and so might found the jurisdiction anywhere on her own choice.

“H. B.”

On an appeal, the Sheriff (Adam) affirmed the foregoing judgment, with the annexed note :—

“*Note.*—This action was personally served on the defr. within the jurisdiction of the Court. The child is alleged to have been begotten in Crieff, and hence the obligation on the part of the defr. to contribute to the support of the child, on which the action rests, also arose within the territory of the Court.

“These facts seem to bring the case within the principle of the case of *Kermack v. Watson*, 7th July 1871, 9 Macph. 984, and to distinguish it from that of *Crichton v. Robb*, 9 February 1860, 22 D. B. M., 728. J. A.”

Sheriff BARCLAY.

MORRISON v. SCHOOL BOARD OF ABERNETHY.—22d June 1875.

**Education (Scotland) Act, 1872—Schoolmaster—Wrongful dismissal—Damages.**—In this action the pursuer sought to recover £50 from the School Board of Abernethy, as damages for illegal and unjustifiable dismissal, he having been summarily dismissed from his office of head-master of Abernethy Public School without reason assigned. The defra. pleaded, *inter alia*, that the pursuer’s appointment being only “during the pleasure of the School Board” (*vide*



15th clause of 55th section of Education Act), the defrs. were entitled to dismiss him at any time. The Sheriff decided in favour of the pursuer. The following judgment fully explains the case :—

" *Perth, 22d June 1875.*—Having heard parties' procurators, and made avizandum with the closed record and debate : Finds that, from the written documents in process, and the admission by the defrs. in the record, the pursuer was, on the 14th July 1873, by the defenders elected and appointed head-master of the Public School of Abernethy, at the minimum salary of £150 per annum, besides having a house and garden, and that he entered upon the duties of teacher on 1st October of said year, and took, and kept possession of, the house and garden, and was paid his agreed-on annual salary quarterly during the year : Finds that neither party having given any notice to terminate the agreement with the lapse of the year, the pursuer commenced the second year's service ; but on the 30th November 1874 the defrs. intimated to the pursuer that they relieved him of his engagement as head-master of the Abernethy Public School, but agreed that he should be paid the current quarter's salary in full, and which was accordingly paid to him on 15th December thereafter : Finds, considering the nature of the office, and the stipulation as to an annual salary payable quarterly, with the occupancy of a house and garden, and in the absence of any contrary stipulation, the bargain was for a year certain, and which engagement was renewed by tacit relocation for the subsequent year : Finds that the defrs., though specially called on, have not put on record any averments of fault on the part of the pursuer to justify such dismissal : therefore repels the defrs.' second preliminary plea and their first plea on the merits, and orders the cause to the motion-roll, that parties may be heard as to the amount of damages to be awarded.

HUGH BARCLAY.

" *Note.*—At the former hearing of this case, the S.-S. understood that the solicitor for the defrs. argued that it was illegal under the recent educational statute for a School Board to contract with a teacher for any term certain, but that in all cases a national teacher holds office only at the pleasure of the School Board. On the second and recent hearing, the solicitor for the defrs. admitted that the statute did not prevent parties of the freedom of contract, but he disputed that there was any contract for a year in this case, and although there were such, yet under the statute it was defeasible at any time, at the pleasure of the Board, without cause assigned. The first question to be ascertained is whether there was a contract for a year. It cannot be questioned, that were the school at Abernethy a private institution, the transaction which took place in this case would be held to constitute an engagement for a year. The nature of the office is such as points to that endurance in the absence of contrary stipulation, and it is settled law that salary for any definite time implies an engagement for the like period, be it day, week, month, quarter, or year. In this case the salary was by the year, payable quarterly, with the occupancy of a house and garden. The next inquiry is whether such engagement for a term certain is positively excluded by the recent Educational Act. Under the former law no engagement for a period was valid, even though expressly so made. Like some other offices, as burgh clerks, the appointment was held to be in fact one *ad vitam aut culpam*. There existed some plausible argument, considering the character and function of the offices, for such almost indefeasible tenure of office ; but there were other obvious disadvantages in the expensive and tedious mode of getting quit of a teacher who had become inefficient. The recent statute deals with teachers in office at its date, providing for their removal under a certain form of procedure. With regard to those subsequently appointed (of which the pursuer is one), the appointment was left to the pleasure of the Boards, and no provision was made as to their dismissal. It is doubtful if a Board could, under that peculiar phrase, give a life appointment, but assuredly there is no law or reason why they should not make an engagement for a year, or any number of years, defeasible, it might be on stipulated notice on either side. Indeed, under the phrase they might even engage a

teacher to hold office, subject to be dismissed at any time at their pleasure, without cause or notice. If any teacher was so facile as engage on such strange and inequitable terms, it might stand, though one party could renege from the contract, whilst the other could not. But the S.-S. would require very strong expression of power to warrant a School Board at their pleasure to engage a teacher for a certain period, and nevertheless at their pleasure to dismiss him at any time during the term of the contract without cause or notice. The word 'appointment' is not equivalent to 'dismissal,' but, on the contrary, is the beginning, not the termination of a contract. Neither can the S.-S. read the term 'pleasure' as a synonym for caprice, prejudice, or passion. Giving the utmost credit to School Boards elected by the voice of the ratepayers, as being well qualified for, and most anxious for, the conscientious discharge of their important functions, they do not and cannot claim infallibility. The triennial shifting of the Board, and many other safeguards in the statute, all show that the Legislature never intended to intrust School Boards with irresponsible and despotic powers. The S.-S. is ever cautious to exclude public expediency from counteracting clear enactments of law, but he may venture to express an opinion that the power to contract with teachers, and then to dismiss them at any time, without fault, would be grievous to a most deserving class of officials, and still more to the cause of national education. Unless excluded by the statute, where the teacher appeals to the ordinary courts of law for a breach of a civil engagement, there can be no exclusion of jurisdiction, which would, indeed, amount to a denial of justice. The defrs., though specially called on, have declined to state the grounds of dismissal, and it would be against all forms of procedure to afford them another opportunity of recording their ground of dismissal. H. B."

*Act.—Robert Mitchell.—Alt.—John Kippen.*

## SHERIFF COURT OF ABERDEEN.

Sheriff GUTHRIE SMITH.

GRAY v. ABERDEEN, NEWCASTLE, AND HULL STEAMSHIP COMPANY (LIMITED).—  
26th May 1875.

*Carrier—Transshipment—Contracting parties.*—Mr. Gray, merchant, Aberdeen, raised an action in the Aberdeen Sheriff Court against the Aberdeen, Newcastle, and Hull Steamship Company (Limited), carrying on business and having their principal place of business in Aberdeen, concluding for payment by them of a sum of £34, 5s. as damages sustained by the pursuer in consequence of the defrs., who were carriers of 500 sacks of "Dons" flour, on a bill of lading deliverable to order (which bill of lading was invoiced to the pursuer), having, on the arrival of the said flour at Aberdeen on the 11th of January 1875, landed the same on the open quay, and failed to protect it from injury, whereby, through the fault and negligence of the defrs., the flour was wetted, injured, and damaged to the extent of the sum sued for. The defrs. pleaded, in defence to the action—first and preliminary, that the present action ought to have been directed against the owners of the vessels "Panther" and "Leopard," with whom the contracts for the conveyance of the flour from Dunkirk to Aberdeen were made, as appeared from the bills of lading; or otherwise, that the present action was incompetently directed against the present defrs., in respect that the said contracts were not made with them; and (2) on the merits, that the flour was landed and delivered undamaged, and that the damage complained of was caused through the fault of the pursuer. The Sheriff-Substitute (Dove Wilson), on the 22d April, repelled the preliminary defences, and allowed the pursuer a proof of his averments and the defenders a conjunct probation. The defrs. appealed to the Sheriff.

The Sheriff has issued an interlocutor in the appeal, refusing the appeal, and affirming the interlocutor appealed against. In a note to his interlocutor,

Sheriff Guthrie Smith says that the question here raised is one of very general importance, which, so far as the decisions of our own Supreme Court are concerned, is still open, and which has been differently determined in England and America. In England the view taken has been this:—A carrier who receives goods addressed to a particular place *prima facie* undertakes to carry them the entire distance, and if his own proper conveyance goes only part of the way, the carrier who then receives them from him becomes his agent for fulfilling his contract. It follows that when a loss arises on any part of the journey, action lies not against the second carrier but against the first, with whom the contract was made. This is the result of a series of decisions. But more recently it has been decided, in the case of *Oldridge*, that a railway company may competently stipulate that they shall not be liable for loss "off their line;" and thus, if the principle of the earlier cases is to be adhered to, this will be the consequence: The party cannot sue the A Company, because the injury was not done on their line; and he could not sue the B Company, because the contract was not made with them. It is not, therefore, surprising that the Chief-Justice, in *Oldridge's* case, took care to observe that in the state of facts therein disclosed—viz, of the first company limiting their liability in the manner indicated—the result might be that the defts' undertaking as carriers extended only to their own line, and that in forwarding goods on a further line they acted merely as forwarding agents; but it was not necessary to decide that question. As regards some of these English decisions there appears to be room for the observation that the matter has been treated too much as a question of law growing out of the relation of carrier and customer, when in reality it is simply a question of fact. Whether a man undertakes to be responsible as a common carrier for ten miles or one hundred miles evidently depends on what was the understanding of the parties, and in ascertaining that understanding there was nothing to exclude the application of those general elementary principles common to all contracts. If he expressly stipulated that he should not be responsible beyond his own *terminus*, he was under no obligation to do more. If by implication it is sought to extend the undertaking, the matter must be determined by the terms of the receipt, the usage of the business, and such other evidence as is available for the determination of it as a question of fact. This accordingly is the view of the subject which has been taken in America by tribunals, whose rulings on points of mercantile law are entitled to very high respect. There are many cases where the American Courts have held a carrier liable beyond the limits of his own road upon the ground of a special undertaking either expressed or implied; but a carrier receiving goods directed to a point beyond his line is held to be responsible beyond his own line only as a forwarder, unless he makes a positive agreement extending his liability. In the present case it appears that the flour was loaded at Dunkirk on board of two steamers plying between Dunkirk and Hull, the bills of lading signed by the master making it deliverable at the port of Hull in "transit to Aberdeen." A memorandum on the margin states "that the goods are to be forwarded on arrival by Messrs. Brownlow, Lumsden, and Co. from Hull to Aberdeen by steamer at ship's expense, *but not at her risk*." In the Sheriff's opinion this was not a contract for the entire distance. It was a contract to Hull, coupled with an obligation to make a contract for another steamer conveyance to Aberdeen, as the agents of the owner of the goods and for his behoof, but in regard to which the Dunkirk steamer should have no responsibility. The defts. therefore have been properly convened to answer for their own negligence, and the plea stated in defence has been rightly repelled.

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## PACTA ILLICITA

THE plea that a contract is contrary to public policy, or immoral, and that therefore it is not binding, is so convenient a way of getting rid of troublesome obligations, that it cannot surprise us to find that it has been often raised, and under the greatest variety of circumstances. The law of England, as well as our own, abounds with curious decisions, giving rise to very curious distinctions, upon this subject of illegal or immoral contracts. Perhaps these distinctions are as delicate as any which the ingenuity of bench and bar have ever invented. In addition to the interest arising from the consideration of such nice points of law, these decisions throw a curious light upon the social history of the past. Some relate to the early struggles of labour against capital—put down with a high hand by Tory judges; others remind us of the days when smuggling was so rife upon our coasts. They tell of an age when gambling was universal; when lotteries were really popular; and when the State by means of usury laws imposed restrictions upon a more legitimate means of making money.

It is also curious to observe the varied class who have from time to time availed themselves of such a plea—a class composed of ruined gamblers, heartless profligates, penitent Sabbath breakers, idle apprentices, wily lawyers, and others. We propose in the present article briefly to illustrate by means of the decisions some of the principles and distinctions which have been established in this branch of the law.

Taking first that class of illicit and invalid contracts which may be said to have sprung out of the domestic relations, we find our law, from a regard for the sacredness of marriage and a desire to throw every obstacle in the way of those who despise or dispense with its legal ties, refusing to give effect to any obligation arising out of the unlawful intercourse of the sexes. To

such an extent was this policy pursued, that it was after some hesitation that the right of a woman to recover damages for seduction came to be recognised. There is a number of reported decisions relating to bonds *causa adulterii*, but it is satisfactory to observe that there are almost none of a recent date. In the old case of *Durham* (July 20, 1622), where a bond was granted to secure a certain sum to the adulterous issue, the Lords found that it could not be registered, nor found an action, either at the instance of the mother or of the child. In the next century, however, we find an equitable distinction being made between a bond in favour of an adulteress and one granted to her innocent child, and the Court allowing an action to lie upon the latter (*Hamilton*, June 26, 1765, M. 9471).

In the case of *A. v. B.* (May 21, 1816, F. C.), a distinction was made between an action to enforce such an obligation and one to reduce it at the instance of the granter's heir. We are told that the judges "expressly recognised the distinction between the situation of an obligation *ob turpem causam*, where action is brought to compel implement of it, and its situation where action is brought to be restored against implement which has already taken place." From the case of *Johnstone v. M'Kenzie's Executors* (May 14, 1806) it would rather appear that an annuity *ob turpem causam*, even when given by way of legacy, will not be effectual. In that case the executors of the deceased refused to give effect to the bequest, and an issue was allowed to try the question whether or not it was the reward of immorality.

In the English Courts bonds granted in favour of mistresses have been the subject of several decisions. Generally speaking, no such bond will be valid if it has been granted with a view to induce future cohabitation; and accordingly, in one case, we find the question left to the jury was whether at the time the bond was given there was or was not an intention and agreement to continue the connection for the future (*Friend v. Harrison*, 2 C. & P. 584). "The law," says Vice-Chancellor Wigram, in the case of *Hall v. Palmer*, 13 L. J., "has been correctly stated to be, that if a bond be given for future cohabitation, either wholly or in part, it is void. Another way of stating the question is, that if the instrument is of such a nature as to give to either party a motive to continue the connection, it is void on the ground of its being *turpis contractus*." In the old case of *Turner v. Vaughan* (2 Wilson, 339), where the bond was for past cohabitation, Justice Bathurst observes, "Where a man is bound in honour and conscience, God forbid that a court of law should say the contrary. And wherever it appears that the man is the seducer the bond is good." In one case, however, where the woman knew that the man with whom she had been cohabiting was married, a bond given to her at the termination of the illicit intercourse, securing an annuity for herself and also providing for the issue, was held void. On the other hand, the law will, in the ordinary

case, favour such provisions, and the mere fact that the granter expressed his intention of continuing the connection after the date of the bond, and even the carrying out of that intention, will not render it *turpis contractus* (Hall's case, *supra*).

Another class of cases which illustrates the care taken to secure marriage obligations is to be found in the decisions relating to contracts *contra fidem tabularum nuptialum*. In a number of cases we find sons relieved upon this ground from obligations entered into upon the eve of marriage with their own or their wives' fathers and to the prejudice of their marriage provisions. It seems to have been the custom at one time for fathers, while ostensibly making favourable settlements for the children upon their marriages, to extort back bonds relieving them to a greater or less extent from what they had undertaken of such transactions. The cases of *Grieve v. Thomson* (February 21, 1785, M. 9478), where a son had given to his father a virtual discharge of his obligation under the marriage contract, and that of *Arbuthnot v. Morison* (November 22, 1716, M. 9487), where a father-in-law had had recourse to the same device, are examples.

Under the head of *Sponsiones Iudicæ* in Morison is placed—“*Premium for procuring a wife.*” In an early case (January 27, 1698) we find the Earl of Buchan suspending a charge upon a bond granted by him to Sir John Cochrane of Ochiltree, for his assistance in procuring to the Earl an English lady in marriage with a certain fortune. Fountainhall reports a similar case, which he says “moved laughter.”

The form of such a bond or written obligation is given in the later case of *Thomson v. MacKaile* (February 14, 1770, M. 9519). In that case it was granted by a father and son in favour of an Edinburgh lawyer, whose wife appears to have been the match-maker, and contained an agreement to pay a small sum of money “three days after the date of the contract of marriage that shall, by the providence of God, be voluntarily entered into, and signed and delivered, betwixt our son and a young gentlewoman described as within.” There were elaborate arguments in this case, and it was maintained, in support of the validity of the bond, that there were perhaps very few marriages which were not brought about by the intervention of third parties. The Court, however, found the missive *contra bonos mores*, and assoltied the defender.

In the case of *Proven v. Calder* (January 23, 1742, M. 9511), a bill granted to a young woman in security of a promise of marriage was sustained. But really here there was nothing more than an action of damages for breach of promise, with this peculiarity that the amount of damages had already been assessed by the parties.

Wagers and other gambling transactions have not met with much favour from our law. “The view,” says Mr. Bell, in his Commentaries, “which has been taken in Scotland is, that the laws of the country and its judicatures were instituted to determine adverse

rights, and not the idle or impertinent doubts and inquiries of persons not interested in the matter." The common law which viewed such contracts as trifling, if not actually immoral, was supported by statute so early as 1621, when the Act "anent playing at Cardes and Dyce and Horse races" was passed. In the old case of *A. v. B.* (February 9, 1676, M. 9505), the Lords sustained a pursuit which "was intended for a sum of money which the defender was obliged by his promise to pay in case he should be married; having gotten from the pursuer in the meantime a piece which the pursuer was to lose in the case the defender should not be married." But "some of their number were of the opinion that *sponsiones ludicæ* of the nature foresaid ought not to be allowed."

Bankton, however, says (i. 421, 46)—"A wager is a mutual stipulation between two persons whereby the one agrees to forfeit or pay a sum of money, etc., to the other, on condition a thing be or be not as asserted, or in the event of an uncertain contingency. There seems, in the general, nothing unlawful in this more than in a conditional obligation." That wagers have sometimes been sustained as the grounds of legal proceedings is clear from the case of *Hope v. Tweedie* (December 3, 1776, M. 9521), in which an action for a wager of a pipe of wine between two gentlemen, to be paid to him who should walk first to Edinburgh from a certain place in the country, was held competent; and in the later case of *Bruce v. Ross* (January 26, 1787, M. 9523), the opinion that a wager was in no case a legal ground of action does not seem to have been an unanimous one.

The Act 1621, c. 14, aimed at discouraging gambling, by forbidding cards and dice altogether in houses of public entertainment, and even in private dwellings, except when the host took a part in the game, while it forfeited to the poor of the parish all gains above one hundred merks made within twenty-four hours, either by cards, dice, or horse-races. The party who lost was still bound to pay, and accordingly in one case the Lord Advocate was found entitled to insist on consignation of the money. Sir George Mackenzie, in his observations upon this statute, remarks that this Act "is not extended to other wagers, such as that ships will arrive at such a day, or in such a place, which was not found to fall under this Act, which speaks only of cards, dice, and horse-races. It seems that this Act would not be extended to any other game." It is not surprising that in that age such a statute was not strictly observed. Little more than forty years after it was passed, we find it argued that "the Act of Parliament is in desuetude, and it is now frequent by persons of all quality to play and to pay a greater sum than 100 merks." The Lord however "found the Act of Parliament to stand in vigour" (*Park v. Sommerville*, Nov. 12, 1668, M. 3459). In 1774, it is reported that "the point deliberated upon by the Court was whether or not the Act 1621 was in desuetude? They again decided in favour of the vitality of the Act, and

ordained intimations to be made by certain kirk-sessions interested in the matter (*Maxwell v. Blair*, M. 9522). Its most modern supporter is Lord Deas, who remarked in a recent case, "that this statute remains in force I have no doubt whatever." The Act of 9 Anne, c. 14, was passed "for the better preventing of excessive and deceitful gaming." It applied to all kind of games, and rendered every species of document granted for gaming debts null and void. Parties who lost were entitled, under certain conditions, to sue for the recovery of the money which they had paid, and if they failed, to take benefit of this provision as any other person might, recovering treble value—two-thirds of which was to go to the poor. Since the date of this Act several statutes have been passed, the tendency of all of which has been still further to discourage gambling transactions, and to strengthen the distinction between innocent and immoral games and sports.

Perhaps the plea of *pactum illicitum* was never sought to be extended further than by some of the Judges in the case of *Paterson v. Shaw*, 20th Feb. 1830, 8 Shaw, 573. That was an action of damages raised by one Edinburgh gentleman against another who had represented that he cheated at cards. The Jury Court, when the cause was remitted to them, raised a doubt as to the relevancy of the action, seeing that the slander libelled arose out of an illicit transaction between the parties, and the case was accordingly sent back to the Court of Session for the purpose of having the question of law decided. In his note upon this case the Lord Chief Commissioner observes, "The saying or writing of another that he cheats at play is an actionable slander; but if it appear upon the face of the summons and issues, or either of them, that the slander relates to an illegal, prohibited and punishable transaction, a series of questions occurs on the relevancy—on the broad question whether *ex tale transactione actio oritur*? If he had not been engaged in an illegal act the slander would not have taken place, and by the terms of the summons, the illegal conduct is the foundation of the complaint." In the Court of Session several of the Judges expressed their doubts as to the competency of the action, and they seem to have got over the difficulty which they felt in admitting the evidence of illegal transactions by treating the alleged slander as a criminal accusation. "At first," said Lord President Hope, "I entertained some doubts, but when I see the very fact charged of cheating at cards is made a crime by the statute I cannot have any." The relevancy of the action was accordingly sustained, and issues sent to a jury. But although the Court will thus admit as relevant evidence what is practically an inquiry into the rules of a game of chance, when the object is to determine the truth or falsehood of an accusation, and consequently the right to damages, they have firmly resisted any attempt to obtain their decision when the question has really been whether or not a party has played unfairly. Sums lost in play cannot be recovered, nor the gainer's claims enforced. The



case of *Paterson v. Macqueen and Kilgour*, March 17, 1866, 1 Macph. 606, is upon this point very interesting. It was an action raised by the executrix of a Mr. Paterson against two defenders, who, as she alleged, had taken advantage of the deceased, who was not in full possession or command of his mental capacities, and had won from him by unfair play considerable sums of money, for which he had granted bills and promissory notes. There was however no allegation of absolute incapacity on the part of Paterson. The pursuer argued that this was not an action of repetition, but of damages. In deciding the case, the Lord President (Colonsay) remarked:—"It is not denied that, if the play was fair, these sums were actually lost. Now what does that resolve into? If the play was fair, although artifices were used to induce Mr. Paterson to engage in it, he could, I apprehend, not have come here to recover the sums so lost, just as the other party could not have come here to enforce his claim; for we do not take cognizance of gambling debts in any circumstances. But then it is said that this is a case of cheating at cards, by which it is meant that the play was unfair. But if this Court does not take cognizance of fair play, is it to go into the rules of the game, and inquire whether there has been unfair play? That is as much out of our cognizance as the other." Lord Deas said: "I think if we were to sustain an action of damages in such circumstances we should just be sanctioning in another form a *condictio indebiti*." The action was accordingly dismissed as incompetent. The decision does not of course exclude the competency of an action to recover money obtained by gambling from some one really in a state of mental incapacity. Here there would be no question of fair or unfair play, but a charge of obtaining money from one who was incapable of managing his own affairs, and did not know what he was about. Lord Deas carefully guards himself in deciding Paterson's case. He says: "It is not necessary to hold that there never can be a relevant action for cheating a man out of his money while he is engaged in playing cards. But if there can be such an action, it would require to be founded on very specific allegations of something altogether different from a violation of the rules of the game—allegations exclusive of all inquiry as to whether the rules of the game had been violated or not. If the action had been founded upon distinct allegations of total incapacity on the part of Mr. Paterson, either from drink or mental defect or disease at the time when he lost and paid the money, I by no means say that a case of that kind would have been irrelevant." It is however clear from this decision that in order to make an action of this kind relevant, there must be very distinct averments of incapacity.

Reference has already been made to the light in which, apart altogether from statute, wagers are viewed by the law of Scotland. They are deemed too trifling to engage the attention of a Court—or, in legal language, a wager is *sponsio ludicra*. As was remarked in the old case of *Wordsworth v. Pettigrew* (May 15, 1799, M. 9524),

"Courts of Justice were instituted to enforce the rights of parties arising from serious transactions, and can pay no regard *sponsionibus ludicris*." But a gambling transaction has nevertheless formed (indirectly at least) the ground of a competent action. A good illustration of such an action is afforded by the case of *Graham v. Pollak* (Feb. 5, 1848, 10 D. 646). A certain dog having won in a coursing match, a dispute arose between its nominator and its owner, both claiming the stakes. The stake-holder raised an action of multiplepounding, to which both were called. The competency of the action, arising as it did out of this sporting transaction, was questioned. The majority of the judges decided in favour of the competency, and repelled the plea of *sponsio ludicra*. But the ground upon which they did so is clear from the judgments. It by no means follows, said Lord Fullerton, "that after the prize is won, and the *sponsio ludicra* determined, competition regarding the prize may not arise involving questions of law properly within the province of the Court." In this case the question was not which dog had won the match, or whether the match had been fairly proceeded with—with such questions the Court could have nothing to do. But, as pointed out by Lord Jeffrey, the whole sporting question had been settled and the prize awarded, and the question to be decided was simply what individual had an interest by law and contract in what dog had won. There was in fact a question of patrimonial interest which it lay within the province of the Court to dispose of. This case, taken with the more recent decision of *Calder v. Stevens* (July 20, 1871, 9 Macph. 1074), would seem to establish, that while the Court would not decide who had won a race or game, on the principle of *sponsio ludicra*, and would not sustain any gambling transaction because illegal, questions relating to the right to stakes (always assuming that the game or contest was a legal one) may form the ground of competent actions. In *Calder's* case, the action was raised to enforce payment of the stakes at a racing meeting. The Lord Justice Clerk, in giving judgment, after pointing out that a horse-race is not unlawful, and noticing the distinction of the civil law between games of chance and the *certamina de virtute*, remarks, "While therefore our Courts would probably refuse to decide who was victor in such a game, or who gained an archery or rifle prize, still, if the contest was lawful in itself, and no such question unsuited to a court of law arose, there is no principle on which they should refuse to decide a purely patrimonial question arising out of it. If the holder of the Elcho Challenge Shield refused to deliver it to the acknowledged winner, I do not suppose we should hesitate to do justice in such a case; and the case of *Graham* about the prize at the coursing match is an illustration of the distinction. For in all these cases, and many more which might be suggested, the contest or sport itself was lawful, although gambling on its issue was illegal."

It is instructive to compare these cases, in which action was sus-

tained with that of *O'Connell v. Russell* (Nov. 25, 1864, 3 Macph. 89), in which it was refused as incompetent. In that case the action was, as in the others, for the recovery of stakes. But it was upon the ground of unfair conduct upon the part of the winning jockey. The pursuer, indeed, contended that his action was grounded on the contract of deposit with the defender as stakeholder who was no party to the wager. From the circumstances, however of the case, it was impossible for the Court to decide it without assuming the position of umpires, and determining upon the evidence who won the race.

By the 18th section of the Act 8 & 9 Vict. c. 109, which declares that all gaming contracts are null, and that no sum staked upon a wager can be recovered in a court of law, an exception is made in favour of subscriptions towards "any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime or exercise." But the Scotch cases have not proceeded upon this statute; on the contrary, there have been repeated doubts expressed from the bench as to whether it extends to Scotland.

In England there has not been the same reluctance to deal with wagers in courts of justice, or at all events they have not in that country adopted the general principle that the settlement of such disputes is unworthy of these tribunals. Of course the common law has been altered by the statute just referred to. But in order to diminish the number of cases of this sort prior to the Act 8 & 9 Vict., certain classes of wagers had been entirely discountenanced as being *contra bonos mores*. Thus, in the famous case of *Da Costa v. Jones* (2 Cowper, 729), action was refused upon a bet laid between two persons upon the sex of a third, on the ground that such a wager led to an indecent inquiry. Lord Mansfield, in giving judgment in that case, remarked, "Whether it would not have been better policy to have treated all wagers originally as gaming contracts, and so have held them void, is now too late to discuss. They have too long and too often been held good and valid contracts. But notwithstanding they have been so generally entertained, there must be a variety of instances where the voluntary act of two indifferent parties, by laying a wager, shall not be permitted to form a ground for an action or a judicial proceeding in a court of justice."

There are accordingly a curious and not very consistent set of decisions relating to wagers in the law of England. Lord Campbell has observed, "I regret to say that we are bound to consider the common law of England to be that an action may be maintained upon a wager, although the parties had no previous interest in the question on which it is laid, if it be not against the interests or feelings of third persons, and does not lead to indecent evidence, and is not contrary to public policy. I look with concern and almost with shame on the subterfuges and contrivances and

evasions to which judges in England long resorted, in struggling against this rule, and I rejoice that it is at last constitutionally abrogated by the legislature" (*Thackoorseydass v. Dhondmull*, 6 M. P. C. C. 300). Not only were immoral and indecent wagers invalid, but also those which the judges chose to consider as opposed to public policy. Hence wagers between voters as to the result of the election were found to be illegal, as contrary to the foundations of the Constitution, and tending to encourage bribery and corruption (*Allen v. Hearn*, 1 T. R. 36). So also was a wager upon the probability of the assassination of the Great Napoleon, being considered at once immoral and contrary to good policy (*Gilbert v. Sykes*, 16 East. 150). Upon the same principle wagers respecting the amount of any branch of the public revenues, or of the result of a criminal trial, have been treated as illegal.

In the case of *Foulds v. Thomson*, 19 D. 803, an attempt was made to escape from liabilities incurred to a stockbroker upon the ground that the transactions in which he and his principal had been engaged constituted gaming and wagering in the sense of 8 & 9 Vict. This case raised the question whether the common speculations on rises and falls in the market are gambling transactions. To all appearance there is in such cases a purchase and transfer of stock, while in reality the parties are taking the chance of the rise or fall in the market, and contracting only for the differences. It was held in the Sheriff Court that such transactions were wagers—but that as they were only null and void, not illegal, the broker who had given his professional assistance was entitled to remuneration. But the Court of Session, without deciding what the claim of the broker would be if dealings in which he had been engaged had been null and void, held that they were not, not being wagers or belonging to the class of transactions struck at by the Act in question. "The question," said Lord Murray, "before us is—Is there anything like gaming or wagering in the transactions complained of? In all gaming, one party wins and the other loses, all cannot gain; but here so much stock is bought—it rises. A. has sold, B. has bought through a broker. A. may have sold at a higher price than he paid. B. may in turn do likewise, in which case all might be gainers. This cannot be gaming. I am far from saying they are engaged in a laudable pursuit. But all the parties might equally lose. I cannot assimilate this to the nature of gaming or wagering, to constitute which there must be two parties, one of whom must lose."

As in many cases of gambling debts—bills and bonds have been granted which have afterwards in the hands of indorsees given rise to litigation; the question as to how far a *bona fide* indorsee is to be prejudiced by the invalid consideration for which his bill was given has more than once been raised. In the case of *Stewart v. Hislop* (February 18, 1741, M. 9510), it was found not competent to prove by witnesses that the bill charged

on was accepted for money lost at game against an endorsee for an onerous cause, who was not privy to the wrong. The same doctrine was given effect to in the case of *Neilson v. Bruce* (January 25, 1740, M. 9507.) Yet the words of the Act of Anne are very distinct, providing that notes, bills, etc., for gaming debts "shall be utterly void, frustrate and of none effect, to all intents and purposes whatsoever." A different view of this statute had moreover been taken in England, as is shown by an opinion of Lord Mansfield (2 Douglas, 636), when he says, "The law is settled that a holder coming fairly by a bill or note has nothing to do with the transaction between the original parties, unless perhaps in the single case (which is a hard one, but has been determined) of a bond for money won at play." It was probably the reasonable desire to secure a uniform practice in the administration of the statute in both countries which led the Court of Session in the unreported case of *White's Trustees v. Johnston's Trustees* (January 22, 1819), to find that the objection of having been granted for a game debt applied to bonds in the hands of an onerous assignee. In the subsequent case of *Elliott* (Nov. 24, 1826, 5 Shaw, 40), they passed a bill of suspension of a charge given by the indorsee of a bill granted for a gaming debt; and in the case of *Hamilton v. Russel* (May 18, 1832, 10 Shaw, 549), Lord Cringletie observed, "I think such a bill is just a piece of waste paper." The case of *White's trustees*, already referred to, came before the Court again (May 28, 1828, 6 Shaw, 818) in a question between the assignee (who had failed to recover anything from the debtor under the bonds) and the assigner, from whom he sought repayment of the money which he had given for them. The latter, taking advantage of the new construction put upon the Act of Anne by the Scotch Court, pled that his assignation being null, he was freed from any liability to repay. But the Court, upon the assumption that the assignee was in *bona fide*, rejected this view without any hesitation. "When a party," said Lord Glenlee, "knowing a document of debt not to be due and exigible from the granter, gets money from an innocent party by assigning it, he must necessarily be bound to repay." The Lord Justice-Clerk said, "I am clear upon the principle that, if it could be held that a person getting the bond, perhaps upon the very night when the gambling takes place, might go to a third party, innocent of the gambling transaction, and get money for the documents of debt, and when repitition is asked might get out of it in this way, it would be an absolute solecism." By 5 & 6 William IV. c. 41, bills, notes, and mortgages in the hands of purchasers for value are not void, but only held as for an illegal consideration, and if on such instruments the granter or maker has paid the money to the holder, he may recover it as money paid to the original payee, as on an illegal consideration.

## CAPTURE OF ENEMY'S GOODS AT SEA.

THE following letters on this important subject by Mr. Lorimer, the eminent Professor of International Law in the University of Edinburgh, have recently appeared in the *Times*. We reprint them because they are worthy of perusal and worthy of preservation. Many of our readers—even those who take a special interest in International Law—may not have seen them, and it is a pity that opinions so valuable and well-considered should be entombed in a file of the *Times*. A translation of these letters, or of portions of them, will, we believe, appear in the next number of the *Revue de Droit International* :—

No. I. "Heartily approving, as I do, the reticence which Lord Derby imposed on our representative at the Conference at Brussels, and his refusal to allow England to be represented at St. Petersburg at all, I think it undesirable that much should be said or written, even by private persons, on the subject of international law in this country at present. If there ever was a case in which a Government could be said to be supported by the unanimous feeling of a nation, it is that of our present Government in its determination not to go forward in the direction either of limiting our rights as naval belligerents, or of adding to our liabilities as neutrals. Though there is no desire in this country to move in the matter at all, it is perhaps scarcely possible, as regards neutral liabilities, that, adhering to the principles which we have consented to adopt, we should be permitted to stand still; and if it should be necessary for us to go back on those principles, that always troublesome evolution will be performed with less irritation, both foreign and domestic, by the spontaneous and resolute action of Government, backed, as it will be, by public sentiment, than as the result of a popular agitation, out of which division of opinion would arise, and in which many hasty and indiscreet words would inevitably be spoken.

"The possibility of such a contingency has long been familiar to many minds, not in this country alone, but in America. Two years ago Mr. Lawrence, the highest international authority in that country, wrote, 'It may be well for the United States if the surveillance of the thousands of miles of sea coast which will be required of them in future wars does not make them deprecate the victory achieved by the eminent counsel to whom their interests were confided at Geneva.' ('Belligerent and Sovereign Rights. By William Buck Lawrence, LL.D., D.C.L., Boston, 1873.')

And we know that, for other reasons, both parties to the Treaty of Washington have as yet found it impossible to fulfil their mutual engagement to urge its acceptance on other powers. For my own part, I have always maintained that the difficulty in which we now find ourselves of being called upon to add the prohibition of the export of arms to the other prohibitions to which we thoughtlessly assented whether or

not it was implied in the words, was involved in the principle, not only of the Treaty of Washington, but of the Foreign Enlistment Acts, both English and American—nay, that that principle covers a great deal more than has even yet become apparent, and involves as its ultimate consequence the entire prohibition of trade between neutrals and belligerents. This opinion, more or less clearly defined, I believe, is gradually becoming the prevalent one in this country. If it should be adopted by the Government, it will necessitate a change of international policy similar to the change of domestic policy on which we entered when the principle of Free Trade, which had long before been demonstrated as a doctrine of economics, was publicly accepted as a rule of political action. If Lord Derby should become convinced of the propriety of applying this rule to our international relations as neutrals, I feel sure that the courage of his conviction will no more fail him than it did Sir Robert Peel; and as the case is one in which not merely national, but international prejudices and passions have to be overcome, it is extremely undesirable that he, and those who act with him, should be embarrassed in the line of action which they may desire to adopt by the suggestions of those who are necessarily so much less acquainted than they are with the entanglements and complications which they must inevitably encounter. In the practical management of affairs we who are without cannot be helpful. Let us therefore be silent, or wait, at least, till our criticisms or our conclamation is called for.

“But the question regarding the seizure of belligerent property under the belligerent flag at sea stands in a different position from questions with reference to our neutrality laws. Here there is as yet no international entanglement. We have come under no treaty engagements; and the Foreign Enlistment Act has placed us under no municipal obligations trenching on international interests. It is scarcely likely that we shall consent to curtail our own belligerent rights at the very moment we are urged to extend those of our neighbours by undertaking new liabilities as neutrals; and all international suggestions on this subject may be confidently expected to meet with a peremptory ‘No.’

“But the subject is one on which there is a babblement among ourselves more embarrassing than any utterances, however insulting to this country, which can proceed even from so great an authority as Dr. Gessner, of Berlin (*Zur Reform des Kriegs Seerechts*, Berlin, 1875); and if our public men are led astray at all, it will be from a desire to gratify the pseudo-humanitarianism of the Peace Party and the equally mistaken selfishness of the Chambers of Commerce. For this reason, it is desirable, if possible, to form a sounder and more consistent public opinion than at present exists, and no medium for this purpose is equal to your columns, if you will kindly permit me to use them.

“The first delusion which I think it desirable to dispel is that when private property is taken for belligerent purposes, either on

land or sea, its owner is simply robbed. The ship and cargo which England seizes, or the horses and cigars which Germany seizes, are regarded as still the private property of the former owner, *de jure*, after they have been seized, just as my watch would continue to be my private property *de jure* after I had been garotted. Even if the risk is covered by insurance, there is supposed to be a total loss on the insurer's part, which makes him the victim of the robbery, in so far, at least, as he has not been paid by the premium which he has received on this or other war risks. But whoever may be the victim, there is always a robbery, and this continues to be the case even if we trace the loss in its ultimate ramifications till it reaches the consumer in the form of an enhancement of the price of the commodities that have been seized. This I believe to be the popular opinion, and it is an opinion which finds support in the utterances of many by whom it is scarcely conceivable that it should be sincerely entertained. (*Vide* Dr. Gessner's pamphlet, as above.) Now, the proceeding to which the taking of private property for belligerent purposes—with a view, that is to say, to the prosecution and speedier termination of a recognized war—is really analogous, is not robbery or spoliation of any kind, but the taking of private property for public purposes—the construction of a railway, we shall say, or of a dock—in virtue of an Act of Parliament. The proclamation of war is an act of the Executive which constitutionally takes the place of an Act of Parliament, or of the decree of the central power in non-constitutional countries. It legitimates the inroad on individual freedom of action by subsuming it, so to speak, under the wider freedom of State action, and the occurrence which befalls the property of the individual is neither more nor less than the emergence of an inherent limitation, which exists in all private property in consequence of the social obligations which necessarily subsist between its holders and the State of which they are citizens. It is a burden which attaches to property just like any other public burdens—such as poor-rates, or taxes, or tithes. Such is the theory of the affair, and it does not lie far below the surface. But Englishmen are not much in the habit of digging for theories, so let us exhibit this one on the surface, as it manifests itself in practice.

“The man whose property is taken does not, or ought not to lose the value of it at all, otherwise than in so far as he shares in the ultimate defeat of his country. In his private capacity he simply gives it up, or lends it, as it were, to his own country. The belligerent who takes it gives him a receipt for it, or in other words draws a bill for it on the owner's country, which he, the belligerent, endorses, contingently so to speak, and for the payment of which he knows himself to be liable in the event of defeat. If the owner's own country behaves honestly by him it honours that bill—in other words, it repays him for the loss he has sustained for the public service, takes possession of the acknowledgment he has received, and converts the debt from a private into a public one. Whatever the issue of the



war may be, it is thus apparent that it is only in consequence of imperfect municipal arrangements—or their imperfect observance—if the private party ever is a loser at all, in his private capacity. If his country is successful in the war it recoups itself for what it has paid him out of the indemnity which it exacts from the defeated enemy, even in cases in which the actual property cannot be restored; if it is unsuccessful, his loss forms part of the expenses of the war, which fall ultimately on the country as a whole in the form of taxation. But in no case does it fall, or at any rate ought it to fall, upon the private owner, or upon his insurer, or even on the consumer of the special commodity, for his loss, too, even where not compensated by the indemnity, is shared by the community as a whole.

"In land warfare something like the arrangement here indicated is not only professed in theory, but, in a very rude and imperfect manner, is attempted to be carried out in practice. On the latter point, at all events, it will not be disputed that the best and latest evidence is that of the military magnates who assembled at Brussels last year. Most Englishmen, I fancy, will agree with the Belgian delegate, M. le Baron Lambermont, that the fairest arrangement would be for each army to pay its own way at the time and on the spot, as our armies did during the great Napoleonic wars. But even when honesty is not carried to what most of our Continental neighbours, it is to be feared, would still regard as a Quixotic extent, it does not follow that no attempt is made at it.<sup>1</sup> 'La valeur des quittances,' says M. le Général de Voigts-Rhetz, 'est réglée par l'usage. Celui qui sera vainqueur, comme celui qui sera vaincu, aura le devoir d'indemniser ceux de ses sujets qui auront en leur possession des quittances délivrées en temps de guerre. M. le Délégué d'Allemagne déclare qu'il ne connaît pas, pour sa part, de guerre où l'acquiescement des obligations ainsi contractées ait fait surgir de sérieuses difficultés. On convient, en effet, à la conclusion de la paix, des dispositions à prendre à cet égard. Généralement le vaincu sera chargé d'indemniser lui-même les habitants du pays vainqueur, et ceux de son propre pays.' When pressed by the Swiss Delegate, Colonel Hammer, with the objection that "les quittances d'usage" n'engagent en rien ceux qui les délivrent,' and urged to bring them within the sphere of International Law, he stated, not very consistently, perhaps, with his assertion that they were provided for by treaties of peace, the difficulty which might exist in imposing them on Constitutional countries. 'Dans ces pays, les emprunts forcés ne peuvent pas avoir cours sans l'autorisation des Chambres.' But he added cynically, 'Dans un autre ordre d'idées, si la quittance n'a pas de valeur, c'est que le Gouvernement du pays occupé ne lui en donne pas.' (*Ib.* 104.) In the absence of adequate municipal legislation then, it is too probable that the

<sup>1</sup> Correspondence respecting the Brussels Conference, Miscellaneous No. 1, 1875. 10.

theoretical arrangement here indicated, and which as much as anything else may claim to be the law of war, is often very imperfectly observed. Still in the case of the Franco-German War, I suppose no German, or Alsatian who was treated as a German, ultimately suffered pecuniary loss, though many even of them were compelled to part with private property and exposed to much suffering which could not have resulted from war at sea. If Germany had been defeated France would certainly have held her liable for the loss of private property by French citizens. As it was France lost the suit, and she paid her own costs, in which those of her own citizens, as well as of the Germans, were included, or ought to have been included. On both sides forced sales were submitted to as inevitable consequences of a war, which itself must be assumed to have been inevitable. But that was all—at least theoretically it was all—that could be measured by money. In the war of 1866 I know, from private sources, that the Prussians paid the Saxons quite fully for the losses which they suffered from the occupation of Dresden, and there is no reason to doubt that Austria would have done the same. I cannot speak with the same confidence with reference to France; but I have been told that the French peasantry, much as they are in the habit of blaming their rulers, do not generally complain of them on the ground that the 'quittances d'usage' given them by the Germans were dishonoured. That the Government at least professed to recognize them is plain enough from the fact that, on 6th September 1871, a law was enacted which bears the title, 'Loi qui fait supporter par toute la nation française les contributions de guerre, réquisitions, et dommages de toute nature, causés par l'invasion.'

"Now, there is not the least difference in principle, or the least necessity for difference in practice, between the seizure of a ship at sea and the levying of contributions on land, in so far, at least, as concerns compensation to the private owner—except this difference that there is far less difficulty in doing him justice in the former case than in the latter. A ship is a large commodity which cannot be stolen. There are many witnesses to her capture, and means of ascertaining her value. Further, there is no temptation to fraud on the part of the captor, even should he be a privateer sailing under letters of marque, because the indemnity to the owner or to his Government can, in no circumstances, fall to be paid by him. To him the ship is 'good prize' if taken legally—i.e., if taken under conditions which the Prize Courts of his own country will recognize. Come of the owner's interests what may, they are no interests of his; and, strange as it may seem, the chief difficulty of regulating the transaction seems to arise from the risk of collusion between the captor and the owner, as private persons. At all events, having no personal interest in the matter, the captor, merely in order to make things pleasant, will always be ready to give a full acknowledgment to the owner, and it is the fault of the owner's Government

if that acknowledgment is not made good. All that is required for private protection is public honesty.

"I do not say that the existing municipal arrangements of this or of any other country are such as at once to relieve the private owner. He has generally to wait till the end of the war, and to take his chance of what the treaty of peace, with its mixed commissions and other arrangements, will do for him. Even if he should not be ultimately deprived of his property, he suffers a real hardship in being deprived of the use of it, possibly for years; and the hardship is one which, in the case of a young and enterprising man, is not compensated even by the payment of interest, because time to him was money, far beyond any interest which he can claim. He has suffered 'indirect damages' which cannot be estimated. But it by no means follows that they could not be averted. Ortolan, the best Continental writer on the side of the question which we have here embraced, indicates the means by which this may be accomplished, though only in a very general way ('Diplomatie de la Mer,' Liv. iii, cii., vol. ii., p. 50). So far as I know they have never been practically adopted, and yet they do not seem to defy definition. The moment that the Prize Court of the captor's country has decided that the prize is 'good'—i.e., that the ship has been taken in accordance with what, in the meantime, must be held to be the laws of war, and is not to be restored—then, if not sooner—there seems no reason why the owner's country, in whose service it has been sacrificed, should not pay for it, and this equally whether it adheres, as it probably ought to do, to the old maxim *bello paria cedunt reipublicæ*, or gives up the prize to the captor, as has been the habit in this country since 6 Anne, c. 13 and 37. The value which the captor has put on it might, as we have said, be a collusive value; but the owner himself could have no great difficulty in proving to the satisfaction of the Government the real value of the vessel, or at all events the sum for which it was insured. The great object of the party who contend for war being made a public transaction, a duel between State and State, which is to spare the pockets, if not the persons, of private persons, would thus be attained in the fullest manner. When the property passed by capture to the one Government, it would immediately be paid for by the other. The seizure would thus assume its real character as a forced sale for belligerent purposes, and its object as a means of bringing the war to an end would be accomplished. It would be a blow dealt visibly and directly at the hostile State, and not one merely affecting it through the community as represented by a limited class. If the simple arrangement here indicated were adopted, I believe the whole objection to the existing rule of the maritime law of nations, with reference to the capture of private property at sea, on the ground of its injustice to private persons, would be removed. The anxiety of the Chambers of Commerce would cease. With your permission I shall venture to say a few words in another letter on the alarmist outcry that our Navy is

inadequate to protect our commerce, and that, in the event of our being engaged in a war, our vast carrying trade would be transferred to neutral bottoms.

"But, before concluding, let me add that the belligerent rule here under consideration rests on principles altogether different from those on which this country long sought to defend the neutral rule that enemies' goods should be liable to seizure under the neutral flag. The maxim 'free ship, free goods,' which we solemnly adopted in 1856, I regard as a permanent contribution to international law. It was at variance with our traditions, and a sacrifice of belligerent rights, which were of far greater value to us than to any other Power; but it was a carrying out of the principle of Free Trade which we had previously adopted in our commercial relations with other countries in time of peace, and which, I believe, need suffer no derogation in the relation between belligerent States and neutral citizens in time of war. The gain to neutrality effected by this change will, I have no doubt, on the whole compensate for the belligerent loss even to this country. At all events it was right; and I trust this country will always be no less ready to abandon rules which injure the rights of others than to maintain those which apparently assert her own. While States fight, by all means let neutral citizens trade; or, if States find it necessary to interfere with their trading, let them honestly pay for, and thank God when they can pay for, the private losses which they occasion. They can pay back money, but they cannot pay back blood."

No. II.—"In the communication which I recently addressed to you I endeavoured to show that what has hitherto been the law of nations with reference to enemies' goods under the enemies' flag does not necessarily involve injustice, or, except to a very limited extent, even hardship, to the private party whose goods are seized. All that is requisite to obviate what, I fear, has been the practical injustice of the rule, as hitherto administered, is that the analogy of land warfare, as explained by the delegates at Brussels, and recognized by Statute in France, should be more consistently carried out, and that the State or executive Government of the belligerent whose goods are seized should regard itself as his debtor in the first instance. If it be necessary for the prosecution of a public war that private property should be exposed to a risk which its owner did not create, it is only fair that the public which did create that risk should accept it and insure him against its consequences. If the public—that is to say, the State—to which the owner belongs, triumphs in the war, it is no loser by the transaction, because it presents the quittance, or acknowledgment for the goods taken, which the owner hands over to it, to its antagonist when peace is concluded, or it repays itself by the indemnity which it imposes or the territory which it seizes. If it succumbs, the private merchant's loss becomes the loss of the State, and is paid by the increased taxation imposed to meet the

expenses of an unsuccessful war, to which he, as a citizen, contributes his share. The equity of this arrangement seems indisputable; nor does its realization in practice, to the extent to which such arrangements ever are realized, present insuperable difficulties. I have said that the State must protect itself against collusion between the owner and the captor, who, though public enemies, might quite possibly be private friends. It has since been pointed out to me, by a friend who is very conversant with such matters, that there is another direction in which the State would require to limit its liability—namely, that in which the merchant, in the hope of gain, violated rules laid down by the State for the guidance of those who claimed its protection. The system of Convoys—of sending ships of war for the protection of fleets of merchantmen on special voyages—has long been known to maritime warfare. I am told that in the event of another maritime war this system will probably undergo modification, and that, in place of protecting special voyages, the Admiralty will protect special routes. It is on those routes exclusively, of course, that I conceive it to be the duty of the State to accept the losses incurred by private parties. In this limitation there is still, no doubt, a certain interference with the freedom of trade. But though the State, in its paternal capacity, is bound to protect the citizen in so far as it can, there is a point at which the filial duties of the citizen come fairly into play, and, in the beginning of a war, till the seas were swept of enemies' ships, there are few who would grudge such a limitation of their power of competing with neutrals. To be called upon, for the sake of their country, to limit their prospects of gain for a time, is a very different thing from being told that they must submit to the loss of their property altogether in consequence of an arbitrary arrangement from which no special benefit can accrue to them, or that the underwriters must pay for it, just as if it had perished by winds and waves. To put the laws of the State, as laid down for the time being by imperfect human intelligence, on a footing of equality with the physical laws of the universe, is to go back to the doctrine of the Divine right of the Sovereign in its most offensive form. Patriotism and piety, in our modern conception of them, belong to different orders of ideas. But it would not be putting the State in the place of God to say, that if it constructed a railway it was not responsible for the death of a man who insisted on crossing the rails in order to get sooner to the market than his fellow travellers.

"But it is said that even if we offer all reasonable protection to our own citizens against the unjust action of this rule, it is still a brutal rule as regards our enemies. Our Continental neighbours are never weary of telling us that it is worthy of the much maligned Middle Ages, and Dr. Gessner goes the length of saying that those who adhere to it can be compared only to savages who roast their enemies and eat them. As it chances to be the only mode of fight-

ing our enemies which does not involve the necessity of cutting them in pieces, one wonders that he did not finish his picture of our bloodless banquets by asserting that we swallow them whole, as the whale swallowed Jonah. In contrast to a species of *wissenschaftliche untersuchung* so unusual with his countrymen, let us hear what a critic whose sympathies we should less have expected has said on the subject. Americans as a nation are opposed, not without reason, to a rule which would place them at a disadvantage with the only greater maritime power than themselves, and it was on this ground confessedly that they insisted on making its abolition the condition *sine quâ non* of their becoming parties to the Declaration of Paris that privateering is abolished. Yet listen to Mr. Dana, as quoted by Mr. Dudley Field ('International Code,' p. 525):

"It takes no lives, sheds no blood, imperils no households, has its field on the ocean, which is a common highway, and deals only with the persons and property voluntarily embarked in the chances of war for the purposes of gain and with the protection of insurance. War is not a game of strength between armies or fleets, nor a competition to kill the most men and sink the most vessels, but a grand, valiant appeal to force to secure an object deemed essential when every other appeal has failed."

"Mr. Dudley Field does not contest the truth of these allegations, or of those of M. Ortolan to the like effect, to which he also refers; and he almost confesses that no answer can be made to the conclusion that, if war cannot be abolished, war upon commerce is of all others the most humane, and not the least efficacious form in which it can be prosecuted. But like all persons who find themselves at fault in theory, and are still resolved to hold on by a foregone conclusion, he throws theory overboard, and betakes himself to practice.

"For a satisfactory solution of the question we must, however, look beyond theoretic considerations to the interests which are practically involved; and in this respect the question is this:—Can private property be spared without seriously impairing the efficiency of military measures as a last resort, for the settlement of disputes between nations bound so closely in pacific relations as those which may unite in this code?"—(P. 529.)

"One would have thought that it was by impairing the efficiency of military measures, on one side or the other, that the settlement of disputes by war of any kind was effected. But he proceeds:—

"And here it is to be observed that the interests of peace which are affected are much broader and more sensitive than those of war. The advantage of the existing rule is the pressure it puts upon the enemy to submit; the disadvantage includes, besides the actual loss of property and derangement of commerce during war, the immense losses sustained on account of the apprehensions of war during time of peace."

"By this I fancy he means the loss to the carrying trade, which, of course, can affect only the one of the two prospective belligerents which knows itself beforehand to be the weaker at sea, and which seems a very legitimate means of inducing it to keep the peace.

"The measure of advantage, on the one hand, is not the actual loss inflicted during the war, but only the pressure indirectly brought to bear on the hostile

Government through the sufferings of its citizens, while the measure of the disadvantage exceeds the actual losses, and includes those derangements of commerce which are so quickly felt when an apprehension of war arises, and from which recovery is so slow after peace has been established.'

"In so far as this argument is not exclusively in the interest of the weaker maritime powers, it will be obvious that it is entirely met by any arrangement which, by making the Government responsible for private losses, converts them from an indirect into a direct means of pressure. The seizure of a bale of cotton then becomes as direct an attack on the hostile State as the killing of a man; and that some hostile States dread it not less is pretty plain from the vehement hostility which they exhibit to the only nation that is ever likely to make it. The two nations whose tender hearts recoil from our bloodless war on commerce, did not shrink from covering their fields with the bleeding bodies of their own fellow-citizens not many years ago.

"But there is a still more whimsical turn which this argument sometimes takes in the hands of our neighbours. When they despair of awakening our humanity, they appeal to those motives of self-interest for which they give us full credit, and they tell us that their remonstrances are dictated by a friendly anxiety, not for our enemies, but for us. In former times—a hundred, perhaps fifty, years ago—England was omnipotent at sea. She had then nothing to fear from the maintenance of this '*privilegierte Raub-system*' (Gessner, *ut sup.*, p. 16). But matters are different now. There are other navies, one of which would perhaps be enough, and two or three of which would be too much for her. Now, there are some considerations with reference to our maritime power of which our anxious friends fail to take account which might possibly reassure them. Of these—omitting for the present the actual condition of our navy, which, notwithstanding the manner in which, for party purposes, we sometimes talk about it ourselves, outsiders who are interested in us will find to be pretty consoling—we shall venture to call attention to its expansive power as compared with any, or, indeed, with all other navies. The ultimate fighting power of a nation at sea must be measured, not by the ships or men which it has in commission, but by the maritime resources which it has at its command. Now, maritime resources, unlike military resources, can be called into existence only under very special conditions. A navy can be recruited only from seamen. A shipful of peasants would be as helpless as a shipful of pigs. Moreover, a sailor is not made in a day. One might almost say that he is not made, but born—*Nauta nacitur, non fit*. Unless he gets his sea-legs before he is fourteen he will never get them at all. Now, the merchant mariner in these respects is as good a seaman as the man-of-war's man. Nor is it in his physical peculiarities alone that he is a trained man for the navy. The whole habits of his life suit him for the service. He is accustomed to hardship, to danger, to discipline, to absence from home. Very often he has no

home at all, except 'upon the deep:' and if the pay were a little better, the navy would be the very home he would choose. Many of us think that the pay ought to be made better even in time of peace; but it cannot be doubted that in time of war the pay would keep pace with the necessity. Let us see, then, to what relative extent we possess this commodity, on which, above all others, our money (and we have money) would be freely expended. There is a very instructive page on this subject in the 'Statesman's Manual,' from which we shall cull a few figures.

"Great Britain has 3,061 seagoing steamers out of 5,148, which is the number of seagoing steamers in the world. Of these the United States has 403, France 392, Germany 200, Spain 202, Italy 103, Austria 91, the Netherlands 95, and Russia 114. Of seagoing sailing vessels Great Britain has 20,832 out of 56,281 in all, while 6,786 belong to the United States, 3,973 to France, 3,834 to Germany, 2,867 to Spain, 4,220 to Italy, 965 to Austria, 1,447 to the Netherlands, and 1,327 to Russia. Assuming the mercantile marine to form the reserve to which we must look if we would calculate the ultimate fighting power of a nation at sea, let us try how Great Britain stands, not with reference to any one navy, for that requires no further computation, but with reference to one or two of those formidable combinations with which we are so often threatened. Suppose, then, that, without allies, we go to war with the United States, France, and Russia, how do our respective reserves stand? The United States has 403, France 392, and Russia 114 steamers, or 909 in all, to put against our 3,061. Adopting the same manner of computation, the coalition would have 12,086 sailing ships to fall back upon, as compared with our 20,832. Or suppose we are called upon to fight Germany, Austria, and Russia single-handed. They would have 405 steamers to our 3,061, and 6,126 sailing ships to our 20,832. Even suppose them to get the help of the United States—always, both from the extent of its shipping and the habits of its people, our most formidable rival (why always our rival?) at sea—the numbers would be only 808 steamers and 12,091 sailing vessels against our numbers as above mentioned. It is needless further to pursue figures which are so accessible and calculations which are so simple. We mention, in conclusion, only one other significant fact which they reveal. The total number of British steamers exceeds the total number of non-British steamers by 974—that is to say, by more than twice the total number of American steamers!

"A merchant steamer or sailing ship, it is true, cannot be so easily converted into a fighting ship as a merchant mariner can be converted into a fighting man. But, short of the highest class of war vessels, there is scarcely any other which might not be directly reinforced from the merchant navy. Then what do our neighbours say to our building yards, from which their own navies, both mercantile and warlike, mostly issue? In the event of war the whole of these, of course, if requisite, would be turned to national purposes. Nor is it to our merchant marine alone that we should



look either for ships or men. Our whole population, comparatively speaking, is maritime. I remember in early life to have spent a winter under the same roof with a charming little French Marquise who had never seen the sea. To her every one was a hero who had been out of sight of land. It may be that such *sancta simplicitas* is rarer than it was then; but the inland populations are as destitute of maritime experience as ever, and yachting is a form in which they have not yet taken to '*le sport*.' Just contrast their capacity, then, of serving at sea as marines or gunners with that of British infantry or artillery, whether of the line or volunteers. There is not a company of volunteers in Great Britain that does not contain a considerable proportion of men with whom marine exercises are familiar and cherished amusements, and who could not serve their country as efficiently or who would not do it as willingly at sea as on land. Let those who are anxious as to the continuance of our naval supremacy, then, take comfort. Our shipping will do far more than protect itself. It will protect us too, and maintain our place for us in the world, if we will only trust to it and use it aright. We shall neither interfere with the neutral rights of others nor allow our own neutral rights to be interfered with. We are free traders as a nation, unanimously and irrevocably, and the principles of free trade are fairly applicable to the relations between belligerents and neutrals. The Declaration of Paris is in no danger, whatever may happen to the Treaty of Washington. 'Free ship, free goods' is a maxim in accordance with our general policy, from which we have no desire to go back. But the relations between belligerents are a different matter; and to promise, if we do go to war, which we shall always do most reluctantly, that we will either spare enemies' property under the hostile flag, or that we will take it only for defensive purposes, while we continue, like the rest of the world, to take enemies' lives for all the usual purposes of war (as I believe has been proposed), would be to throw a sop to the non-maritime powers at the expense both of humanity and of ourselves. In the definition of 'defensive purposes' alone many Alabama questions would be found to lie hidden. The only safe course, I believe, is to promise nothing at all, except that we will do our duty to God, our neighbours, and ourselves, as we understand it, which is pretty much the way in which our fathers understood it, and if the rest of the world does not love us it will respect us and trust us, as it respected and trusted them.

JAMES LORIMER."

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### The Month.

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*The Mode of Framing Acts of Parliament.*—The Select Committee recently appointed to consider whether any and what means can be adopted to improve the manner and language of current legislation,

have agreed to a report in which, after briefly pointing out the improvements already made in the manner and language of current legislation, they advert to the various objections which may still be urged against the style and structure of public Acts of Parliament. These objections will be found to arise from four causes:—

1st. From the mode in which the bill itself is prepared, and the extent to which it varies or deals with previous statutes ;

2nd. From the uncertainty which often arises from inconsistent and ill-considered amendments ;

3rd. From the want of consolidation where groups of statutes on similar subjects are left in a state of great perplexity ; and,

4th. From the absence of any better classification of the public Acts of Parliament.

The Committee discuss each of these objections in some detail, and proceed :

As a remedy for these objections, and with the view of determining on the best mode of improving the current legislation of the country, your Committee have deemed it right to advert, in the first instance, to the recommendation made by the Statute Law Commissioners in 1856. According to that recommendation, it was proposed that an officer or board, with a sufficient staff of assistants, should be appointed to superintend and advise upon Bills in their passage through the two Houses of Parliament. Some of the witnesses who were examined before the Committee of 1857, and others who have been examined before this Committee, have expressed themselves in favour of that recommendation, if a practicable scheme could be framed for working it. They consider that the revision of all Bills by another skilled hand would insure greater accuracy and uniformity, that it might be a means of correcting ambiguities and errors which are caused by inadvertence, or by hasty amendments, and that if a board of that description were permanently appointed, it would be of great use in directing and superintending the process of consolidation. One witness also has pointed out how the system of supervision is carried on in France and Germany ; and, in his opinion, it might be adopted in this country. There, it is said, that the proposed law, and any amendments sought to be made in it, are revised by a commission, which confines itself principally to the prevention of defective wording and contradictory enactments ; but sometimes it reports on the structure of the Bill, when its operation would be contrary to its general object. It appears to your committee that the objections urged by various witnesses to such a board or such a commission are practically insuperable. These objections are, when briefly summarized, that such a system would impair responsibility ; that it would place the Government draftsman in a very invidious and embarrassing position ; that differences and disagreements might often arise between himself and the supervising authority ; that in case of such disagreement the revising authority will have no means of pressing its views upon the attention of Parliament ; that there would be increasing

delays; that such delays would create fresh obstacles to the passage of the Bill; that such obstacles would increase more and more at the end of the Session, when there would be neither the time nor the means satisfactorily to overcome them; the consequence would be that the whole scheme would break down, because it would be proved to be unworkable. To this may be added that the mode of legislating in France and Germany is so essentially different from the mode pursued in this country, that it is impossible to reason from the one to the other. The difficulty is and always will be to reconcile together the symmetry of legislation on the one hand with the independence of Parliament on the other; and it may well be doubted whether these two purposes can be better accomplished than by retaining and improving, so far as practicable, the present system, with such alterations in it as may from time to time be deemed advisable.

According to that system, as originally framed by the Treasury minute of the 12th of February 1869, a department called the office of the Parliamentary Counsel was appointed by the Treasury for the purpose of providing for the preparation of the Government Bills, except those which relate exclusively to Scotland and Ireland. The object of that minute was to establish, in fact, an official department, at the head of which should be a parliamentary counsel of great experience, to whom all the Government departments in England would have a right to go, so that there should be some person directly responsible for all their Bills if anything went wrong. This responsibility was of course intended to be a constructive responsibility, rather than the actual personal responsibility of the parliamentary counsel to draw every Bill himself; for in dealing with so vast and multifarious a work as the drawing of Bills for every department, it would be impracticable for any one man personally to undertake such a task; though he might and ought to be responsible for the draughtsmen who were employed by him. For the sake of uniformity, and also for the purpose of fixing responsibility as so explained, it is important that this system should, in the main, be adhered to.

Assuming that this system, as so explained, is still maintained, there is reason to believe that most of the objections to our current legislation in the four particulars above adverted to may be met and obviated. Some improvements indeed have been suggested, and to these your Committee will now advert.

With regard to the preparation of the Bill itself, it has been suggested that a brief or short statement should accompany the Bill; and that this brief should point out the general object of the measure, and the particular statutes which would have to be dealt with. A brief of this nature was usual in former times, and your Committee are of opinion that some such plan might be advantageously reverted to, at all events in those cases where the matter is complicated, or where previous legislation to any great extent is

affected by it. It has also been suggested that model forms or clauses might be prescribed for general use; such, for example, as clauses imposing penalties or giving jurisdiction to magistrates; clauses of the utmost importance to the proper working of the particular measure to which they are applied, and yet it is said there are no clauses in which blunders more frequently arise. If such clauses were framed and provided by the Parliamentary Counsel, they would, in the opinion of your Committee, facilitate the course of legislation.

It has been suggested by certain witnesses that a general Act giving a meaning to different terms in ordinary and frequent use in Acts of Parliament might be passed, upon the principle of the Act known as Lord Brougham's Act, 13 & 14 Vict. c. 21, entitled, "An Act for shortening the language used in Acts of Parliament," and your Committee think that this suggestion might be advantageously adopted.

With regard to amendments introduced in committee, a distinction should be made between those amendments which are more or less formal or unimportant, and those which are substantial and lead to discussion. Formal or unimportant amendments often run into great length; and in case they are adopted time is required to make the necessary alterations. But here, as elsewhere, the want of time is the great impediment, and so the bill is allowed to go on, though the draughtsman knows there are imperfections in it. As a remedy for this, it has been suggested that it would much facilitate the course of legislation, if an opportunity was offered by going into committee *pro forma*, as a matter of course, for amending the Bill between the time at which amendments were put on the amendment paper and the time at which the day is appointed for going into committee. Many delays and even much discussion would thereby be saved. On similar grounds, and for similar reasons, the same witness has also suggested that, when the Bill comes on for report, formal amendments, and amendments consequential on the changes introduced when the Bill was in committee, should be printed in italics, and then that the Bill should pass also with those amendments, as a matter of course, unless they were challenged by some member as not being formal or consequential. For the correction of other and more substantial alterations, especially those which are not consistent with the existing law, or which may not harmonize with the rest of the Bill, no other remedy, in the opinion of your Committee, is really practicable than to leave the responsibility of correcting them with that department of the executive Government to which the measure more particularly belongs. And whether the measure was brought in as a Government measure, or whether it is the measure of some unofficial member, the more that responsibility is made to rest with the official department the greater will be the chance of its being rightly framed and accurately worded.

With regard to consolidation, the difficulties in the way of it are

confessedly great. There is not only the difficulty of arranging a mass of statutory materials, which are thrown fortuitously together without any order or classification, except the order in which the Acts were assented to by the Crown, but there is also the difficulty of determining on the best mode of effecting the consolidation where the existing law is still unsettled. Nor do the difficulties end here; for when the draughtsman has effected the consolidation in that which he believes to be the best form, there is the further difficulty of passing the Bill through the two Houses, and this difficulty would be practically insuperable, unless Parliament itself should be content to accept the work upon trust, by placing their confidence in those by whom, or under whose auspices it has been prepared. To meet these difficulties, and to insure this confidence, your Committee recommend that the work of consolidation should be carried on upon a regular system, and by skilled hands, acting under the authority of some permanent Government force, either a minister, or separate department constituted for the purpose, in connection with the office of the Parliamentary Counsel. As to the actual mode in which this consolidation may best be effected, the general results to be drawn from the evidence appear to be—1st. That as a general rule it is unadvisable to attempt consolidation where the law is still in a state of flux; 2nd. That amendments in the existing statutes should precede consolidation, or such amendments should be included in the Consolidating Bill in a different type; 3rdly. That where all the clauses of a Consolidation Bill cannot be got through before the prorogation, the Bill should be suspended till the ensuing session, and taken up at the point which it had reached in the previous session. In the opinion of witnesses of great experience, it is confidently anticipated that, provided the measure were brought in upon such authority as above referred to, the House would acquiesce in the work so done, and consent to abstain from a discussion of the old law as to all those parts upon which no amendments are intended to be made. When such Bills become usual and familiar, the tendency to discuss them would be greatly diminished; and they would probably be accepted not less readily than the bills for expurgating the Statute Book have already been accepted year after year by both Houses of Parliament.

With regard to classification, the great want of some arrangement in the printing and publication of the public Acts of Parliament has long been felt, but few attempts have been made to accomplish it. Latterly, indeed, as respects our past legislation, the great bulk of the statutes at large has been greatly reduced by the revised edition, as already explained, but even the revised edition contains matter which was originally or has now become of no general use, and when that edition is brought down to the year 1868, it will be well worthy of consideration whether some classification of the statutes contained in it should not be attempted.

A suggestion has been made, to which your Committee sees no

-objection, that it would be an improvement to follow the Indian system in the numbering of Acts of Parliament, and that, for the future, they should bear date of the year instead of the reign; for instance, 38 & 39 Vict. c. 100, would be numbered, Act 100, 1875.

*Comparative Murder.*—There has been an epidemic of measles in Fiji, and there has been an epidemic of murder in places not so remote. You hardly ever of a morning look into your newspaper without seeing an account of an alleged murder or two in Glasgow and its neighbourhood. In England the case has been no better. At the recent Assizes there have been no end of people sentenced to death. Indeed, murder has been, if not the most fashionable, at least the most popular amusement of the present season; but although not professing to speak as an expert, we suspect that, like every other amusement, even that of reversing the decision of the First Division, it is a good deal over-rated, and that ultimately very little satisfaction comes out of it to anybody. This, however, is certain, that every dog has its day, and this dog must speedily have an end put to its tether. The way to effect this useful public object is to put the tether round the dog's neck. Murder is a practice that has increased, is increasing, and ought to be diminished. The *Times*, very recently commenting upon this subject, argued that, as the crime was increasing, the punishment should be increased too. When garroting became very prevalent, it is urged, the punishment was screwed up, and the crime virtually ceased. So it was in Scotland with the crime of bigamy. When that crime became very prevalent, and people began to think from the slight sentences that were inflicted that the offence was a venial one, the judges increased the punishment. But the case of murder is somewhat different. In the first place it seems to us that it is rather hard upon a man that he should be hanged because other people have committed a similar crime, when he would not be hanged if he were singular in homicidal iniquity. And in the second place, in ordinary crimes where a severe punishment is inflicted in order to check a temporary epidemic of the crimes in question, the sentence can be mitigated after the object has been effected, and people have been deterred from committing the like crimes in all time coming, or at least for some considerable time to come. But you cannot reprove a man after he is hanged. The true reason why the capital punishment should be more frequently inflicted is, that it is just, that it is necessary to the safety of society, that it is the only one which can produce the proper deterrent effect on the worst and coarsest of mankind; and that we at present are witnessing the effects of a too lenient administration of the law in the frequency with which this crime is committed. It is of no use to talk of the sanctity of human life. That is an argument for the abolition of capital punishment altogether; and it is a bad one. There is no sanctity in *animal* life, human or canine. We are not taught to believe that the being perishes when the body dies. And if there were any

peculiar sanctity in human life, all the more reason for deterring people from destroying that which on the theory is to be regarded as sacred.

The murders of various races differ as their speech and their institutions do. We have heard a good deal for many years past of Comparative Philology and Comparative Jurisprudence, and a very good book might be written on Comparative Murder, which no doubt would be reproduced by some American publisher as a new book under a new title—"The Murders of all Nations," or something like that. There are so many ways in which the crime may be committed, and so many motives which may induce people to commit it, that it is one eminently fitted to afford a display of the idiosyncrasies of races and of individuals. In Corsica, for example, you have the institution of the *vendetta*—an institution which the tendency of secluded peoples to traditional forms of evil still retains. In France we have had many *causes célèbres* distinguished by a felicitous novelty of murder which might naturally be expected from that which is pre-eminently a nation of ideas. For example, we had the eminent idea of the man who threatened to roast his father as he would a toad on a shovel. (With a little more training he would have been qualified to be Professor of Vivisection.) He did it too, and with pardonable admiration of art, the jury found him guilty, with *extenuating circumstances*. In Scotland, as regards this art, we have of late fallen off in quality, although we have increased in quantity. To kick your wife habitually every Saturday night, until on some unlucky Saturday night an extra kick is administered which sends her bleeding and shivering and shuddering to death—that is an amusement so stale that one pays very little attention to it. In England the case is a little, but very little, better. But then we come to Ireland, where resides a genial, a fervent, and impulsive people. We read in a recent newspaper a brief account of three murder cases recently tried:—

At the assizes of the county Mayo, on 10th July, Lily Robinson and her mother Anne were tried for the murder of the husband of the former prisoner. The deceased had left them, but had been induced to return, and the theory of the Crown was that he had been decoyed back in order to be murdered; but this Mr Justice Fitzgerald told the jury was a theory too horrible to entertain. On the 15th of September last the two women reported that men with masked faces had entered their house the previous night, and murdered the deceased. The body was found on the floor, which was covered with blood. Lily Robinson's clothes were slightly besmeared with blood. Blood was also found on her neck and hair, and a heavy stick covered with blood was found in the house. The jury found them guilty of manslaughter, and they were sentenced to penal servitude for life.

Mary Macmahon, who was recently convicted by a jury at Cork of the murder of Ellen Sexton, at Limerick, but who was not

hanged in consequence of a division of opinion in the Queen's Bench as to the legality of the removal of the trial from Limerick after it had been opened, was put forward for trial at the Limerick assizes on July 10th for the larceny of the money for which the burglary and robbery were committed. She had been a servant in the house of a Mr. Corbet, was discharged, and was succeeded by Ellen Sexton. On a Sunday evening, when nobody was at home but Sexton, the house was entered, Sexton was murdered, and drawers were forced open, and a pound note, a half sovereign, £3, 10s. in silver, a gold chain, and a quantity of postage stamps were taken. On Monday the prisoner was arrested, the gold chain was found in her chignon, a pound note and a half sovereign were found under her linen garments, and in a lodging-house where she had been that morning she had left behind her a bundle, consisting of a wet chemise in which were wrapt up a quantity of silver and postage stamps. In reference to the bundle the prisoner made contradictory statements when arrested. She offered no other explanation, nor were any witnesses produced in her defence. The jury declared that they could not agree, and they were locked up a second time. At ten o'clock they brought in a verdict of guilty on the count charging the prisoner with having the property in her possession knowing it to be stolen. Mr. Justice O'Brien sentenced her to five years' penal servitude, but reserved a point for the Criminal Appeal Court.

The second trial of Martin Burke, aged 74, and his son, Michael Burke, for the wilful murder of Stephen Scanlan, at Killenaule, county Tipperary, was concluded at Nenagh on Saturday. Martin Burke, holder of a farm on Lord Rosse's estate, had got into debt and was liable to eviction. He and his son were at enmity, and his son left him. The feeling of the son was shown in letters, in which he expressed a wish for his father's death. The old man, to mend his affairs, arranged a marriage of his daughter with a prosperous farmer, Stephen Scanlan. A marriage settlement was executed, under which Scanlan drained old Burke's farm, put it in good condition, and paid his debts. Old Burke then got a fresh lease, but under the marriage settlement Scanlan was to have the farm and support old Burke and his aged wife during the rest of their lives. Old Martin Burke, having got the lease, was reluctant to fulfil his agreement, quarrelled with Scanlan, threatened to rip him with a knife, and struck him a blow which knocked out his teeth. Young Burke also manifested a deadly hostility towards Scanlan, threatened him, and wrote scurrilous letters about him. On the 12th September, father and son, who had not been on speaking terms for two years, met in a public-house at Killenaule, and had a long conversation. Next day Stephen Scanlan was shot as he was getting off his car. His wife was with him. Michael Burke was seen at the place. He was accused of the murder by his sister. Scanlan's wife was the principal witness against her father and brother. The jury said they could not agree, and were



locked up a second time. At half-past eleven the jury were called and said they could not agree. They were sent back, and at twelve came out again and repeated their statement. They were then discharged, and the prisoners were remanded.

*French Penal Law Reforms.*—It is well known that efforts are being made to bring about a reform of the present system of solitary confinement, so full of defects in so many respects. It can be said with truth that for the last sixty years the question has been before penologists. None will ever have been better studied; everything has been urged in the French Assembly for and against the system of Auburn and that of Philadelphia—to wit, collective and individual imprisonment. It was not until the Restoration that the new ideas, already acted upon in so many countries, were seriously thought of in France, viz., that punishment was no longer to be the end but the means.

By an ordinance of 1814 an experimental prison was to be created in Paris, with the object of establishing throughout the kingdom a discipline which should better redress the vicious habits of criminals, and prepare them by order, work, and religious and moral instruction, to take their place as quiet citizens and men useful to society.

In 1830 the Chamber demanded that the penitentiary system of Philadelphia should be made the object of special study. The question was examined with the greatest care. The prisons of almost every country were visited. A special commission, including M. de Tocqueville, made a long stay in the United States.

In 1840 the Government proposed a law in which the Auburn system was commended; labour in common during the day with obligatory silence, separate cells at night. The project, however, did not meet with much approval, and in the ensuing year a new system was presented in favour of the solitary confinement system, extending over the whole period of the expiation, and comprising in its different degrees the whole scale of the punishments that take away freedom. After twelve years of solitude only were the criminals to be allowed to work together, sleeping apart at night. The discussion was a grave and an exhaustive one, and in the end the project was modified; after ten years' solitude the criminal was to be transported.

The Chambers in 1843 re-examined the project, and after four years' fresh study the committee laid down as a principle that solitary confinement alone could save the prisoners from contagion, and society from danger on the liberation. The committee pronounced against transportation.

The Revolution of 1848 scattered the seed about to bear fruit, and the Empire, on grounds of economy, gave up the application of the solitary system. The Empire, however, did not give up the cause of penitentiary reform; its doctrine may be thus summed up:

Exact separation between the legal classes of prisoners.

Numerous classifications based on the degree of guilt.

A severer discipline.

Increase of work.

Thanks to the initiative of M. d'Haussonville, the question was resumed in 1872, and the work began afresh with new and valuable experience.

For the last twenty years, indeed, prison reform has been studied in many countries. In Belgium they have striven to realize in its most distant consequences, even up to the extreme limits of the duration of punishment, the doctrine of solitary confinement.

England has combined for long sentences, both solitude, living in common, and preparatory liberty; and the system has received in Ireland a wholesome impetus at the hands of Sir Walter Crofton, who established intermediate houses.

Holland has lighted upon the plan of proceeding step by step on the road to absolute solitude.

Different States, Germany and Italy, have prisons for absolute solitude, and others for separation during the night only.

The committee appointed by the Versailles Assembly (25th March 1872) visited Germany, Belgium, Holland, Switzerland, Italy, and England. The result of their inquiry is recorded in six volumes. From this elaborate work the new law has been evolved; modest and unpretending in appearance, but important in its results. The following article contains the gist of the whole:—

"Art. 2. Shall be subjected to solitary confinement all prisoners condemned to imprisonment for a length of time not exceeding one year and one day.

"They shall undergo their penalty in the *maisons de correction* of the departments."

This reform is most important, when you consider that it has in view all prisoners condemned to less than one year's imprisonment—that is to say, nine-tenths of the prisoners generally, 400 out of 456 penitentiaries being destined to receive such prisoners.—*European Review*.

*Belles lettres*.—The recent decision in the Court of the last resort in the "Peebles Bells" case has directed attention to former cases of similar import. The first case where the question arose as to the monopoly of the Established Church to this mode of convening congregations arose in the town of "Kincardine-on-the-Forth," in the Parish of Tulliallan. Mr. Bullock was then the parish clergyman. Mr. (afterwards Dr.) M'Farlane was the minister of the Secession meeting-house there. He afterwards removed to Glasgow, where he greatly distinguished himself as a minister and author. He subsequently was translated to London, where he recently died. A new church being erected for the Secession with a belfry, and its tenant—a bell—Mr. Bullock applied for an interdict

against the schismatic instrument. The then Sheriff-substitute at Dunblane (now at Perth) refused to grant interim interdict, whereon the action was withdrawn, and the bell set in motion,—the first in Scotland on a Dissenting church. This kind of movement appears ever to evoke the poetic muse, as is shown in the last number of this *Journal*. The *Edinburgh Evening Weekly Chronicle* of Saturday, 3rd December 1831, contained the following lines on

“THE KINCARDINE CASE.”

BULLUM *versus* BELLUM,  
OR  
BELLUM HORRIDA BELLA,  
OR  
Who shall pull the bell?

Who'll toll the bell?  
I, says the Bull,  
Because I *can* pull,  
And I'll toll the bell.

So, quoth old Mr. Bull, but his day has gone past,  
And an end's to be put to his pulling at last;  
Or, at least, if he's not to be laid on the shelf,  
He's no longer to have *all* the pull to himself.

Says Macfarlane, 'I fear the Secession is falling,  
For the parish church beats us at the bawling,  
And I see from our station we'll quickly be hurl'd,  
Unless we can make some more noise in the world.'

So he buys him a bell, and prepares him for a pull,  
'But stop, reverend brother, I charge you,' cries Bull,  
'It's all my eye Betty, while you keep to your jaw,  
But, if you try ringing, I will take you to law.'

The more Bull tried to shake him, the more Mac grew steady  
on't,

The one shouted 'lawful,' the other 'expedient,'  
And at last, being tired with their growls and *bow wows*,  
They adjourned the debate to the Parliament House.

Now, I'm a plain man, and have some hesitation—  
If Bull's motive be '*Love*,' or Mac's '*Edification*,'  
For, in pulling each other to pieces, I've fears  
They're both helping to pull the right church 'bout our ears.

But this much is certain, the Parliament folks  
Will slice Mr. Bullock as butcher an ox;  
And Macfarlane will find, when he comes to his senses,  
His Bell melted in—an account of expenses."

*Note.*—Mr. Bullock used to mention that, when a student in Edinburgh, his fellow lodgers and chums were a Mr. Lion and a Mr. Lamb.—H. B.

*Measure of Damages for Breach of Covenant to Repair.*—It is not very clearly settled to what extent in an action for breach of a covenant to repair demised premises by the landlord against the tenant, evidence of the condition of the premises at the time of demise is admissible on behalf of the defendant. It has been held that where the covenant is to put the premises into repair, this means to put them into a better state of repair than the tenant found them in. It has also been decided, in *Payne v. Haine* (16 M. & W. 545), that a covenant to keep the premises in repair involves a covenant to put them in repair, for they cannot be kept in good repair without being put into it. Notwithstanding the fact that a covenant to keep in repair is not satisfied by keeping the premises in the same state of repair as when demised, it is still necessary, as is laid down by a variety of decisions, to look to the state of the premises at the time of the demise with a view to estimating the amount of the repair contemplated by the covenant. It was with reference to the extent to which the state of the premises, and their repair at the time of the demise, may be taken into consideration as qualifying a covenant to keep in repair, that we wish to make some observations.

It was said in *Payne v. Haine* (16 M. & W. 545) and in *Belcher v. M'Intosh* (8 C. & P. 723) that the amount of repair contemplated by a covenant to keep in repair depends on the age and class of the house, and must differ according as that may be a palace or a cottage; no one is bound to give his landlord a new house instead of an old one. A house in Spitalfields may be repaired with materials inferior to those requisite for repairing a mansion in Grosvenor Square. This, as is pointed out in *Mayne on Damages* (2d ed. p. 195), is all quite clear, but a more difficult question arises as to how far evidence of actual disrepair, as distinguished from mere inferiority, may be admitted. Mr. Mayne says, in summing up the result of the cases, "The rule laid down in *Stanley v. Towgood* (3 Bing. N. C. 4) and *Muntz v. Goring* (4 Bing. N. C. 451), and approved of in *Payne v. Haine* (16 M. & W. 545), was, that evidence might be given as to the age and class of the premises, with their general condition as to repair, but that the defendant could not prove in detail that such and such a part was out of order. *Burdett v. Withers* (7 A. & E. 136) has been thought to go beyond this. There the defendant's counsel wished to cross-examine as to the state of the premises at the time of his coming into possession. The evidence was refused, and a new trial was granted in consequence. Lord Denman said, 'It is very material, with a view both to the event of the suit and the amount of damages, to show what the previous state of the premises was.' And in *Payne v. Haine*, Alderson, B., says, 'The marginal note of *Burdett v. Withers* may be incorrect, but the judgment is quite right, and shows that a lessee who has

contracted to keep the demised premises in good repair is entitled to prove what their general state of repair was at the time of the demise, so as to measure the amount of the damages for want of repairs by reference to that state.' This reconciles that case with the others mentioned before. The question, therefore, for the future will probably be, not so much as to the admissibility of such evidence as the purpose to which it may be applied. Since *Payne v. Haine* a tenant cannot justify keeping premises in bad repair because they happened to be in that state when he took them. But evidence of this nature, like evidence of age, will be admissible to show how far they were capable of being repaired at all, and what amount of repair could have been contemplated by the covenant."

It is not easy to see how the law could have been otherwise stated than as Mr. Mayne states it, and yet there is a vagueness about the propositions in which the law on the subject is laid down which is unsatisfactory. It is easy to state the general principles, which is all the court had to do in the cases before referred to; the application to practical details is the difficulty. No doubt rebuilding a house is not repairing it. But what amounts to reconstruction, and what to repair only? This is the sort of question which may arise upon a reference to an arbitrator as to the amount of damages in an action for dilapidations, when liability is admitted. The decisions do not lay down any very distinct rule on the subject. There is some difficulty in exactly appreciating the effect of the expression "general want of repair," as employed in Mr. Mayne's summary of the decisions. If the defendant has covenanted "to keep in repair," which it is admitted means "put into repair," why is "general want of repair" at the time of the demise to be taken into consideration to diminish the amount of his liability, and why is "general want of repair" so admissible, but not evidence in detail of particular want of repair? If the estimate of the sort of repairs contemplated by the covenant is to be affected by a general absence of repair at the time of demise, is it not most material to prove in detail that the whole of the premises were out of repair, and to what extent each part was so? If you are to reduce damages by a consideration of the want of repair at the time of the demise, surely it seems reasonable to measure the amount of such reduction by taking a true measure in detail of the want of repair of particular parts? It seems difficult to see why although a rough reduction may be made, in a general kind of way, with reference to the want of repair at the time of the demise, you must not attempt to measure it by accurate consideration of details. But on the other hand it may be argued that if the want of repair at the time of the demise is gone into in detail, the principle established by *Payne v. Haine* is in danger. The principle of that case is that where there is a covenant to keep in repair, the measure of the repair under the covenant is not to be the

state of repair at the time of the demise. If it is not, then, it may be asked, why is it material to go into a detailed investigation of particulars as to the state of repair at the time of the demise?

We venture to suggest the following as some help towards an explanation of the law on the subject. There appears, in the first place, to be a confusion in the cases and text-books between "general evidence of want of repair," and "evidence of general want of repair." It is clear that the two things are quite different. We cannot see why, if the object is to prove that the premises were generally out of repair, that it should not be done by going into details to show that fact. But the true principle seems to be that "*general* want of repair" is the only want of repair that can be considered as qualifying the covenant to keep in repair. In fact the only principle upon which such general want of repair can be taken into consideration appears to be similar to that upon which the "age" of the premises is taken into consideration. It is obvious with regard to houses, as with regard to every other structure, that the structure itself cannot last for ever. It may be repaired from time to time and may last for long; but in the lapse of years it will at length become quite worn out and incapable of further repair. It is obvious also that the period at which this state of things will happen must depend very much on the nature and condition of the structure originally. A very substantially built house will last, and be worth repairing, very much longer than a "jerry built" house run up by a speculative builder in a suburban neighbourhood. Of course, as the main structure of a house grows older it becomes less worth while to do expensive repairs to parts, and consequently it is very reasonable to hold that the age of the structure must be taken into consideration as determining what sort of repairs the parties to the lease contemplated as being worth doing. But the age of the premises is not taken into consideration *quid* the mere time that they have existed, but only as affording a mode of estimating the state of the structure as a whole with respect to wear. Now it seems to us that if the decision in *Payne v. Haine* is to be accepted honestly, the result must be that the only want of repair which can be taken into consideration in such a case is a want of repair of the totality of the structure at the time of the demise, such want of repair being that which would affect the question what sort of repairs it would be worth a reasonable owner's while to do to the structure. This, it is obvious, in substance, comes to the same thing as is meant by the "age of the premises" in the decisions, for the materiality of the age is the wear and tear of the whole structure that is its consequence.

The law is therefore this: a covenant to keep in repair involves a covenant to put in repair, and that in such repair as the state of the premises as a whole would render it worth a reasonable owner's while to put them into. You may look to the original nature of the

fittings, such as papering, painting, &c., to see what the class of repairs contemplated was. The tenant is not bound to put up an expensive-patterned gilt paper where there was a plain and cheap one before. You may look to the general state of the structure as a whole to see what amount of expense it is reasonable should be incurred in repairs. A reasonable man would not lay out on a house that was very old and much worn structurally the same amount in decorations and expensive fittings as he would on a new house. But it seems to us that, consistently with the decisions and legal principle, the tenant is not entitled to say, "Because the fittings and accessories of this house were in a very bad state when I entered it, therefore I am entitled to leave it less well fitted and repaired than it would have been if the fittings and accessories had been in good condition when I entered it." In other words, the general want of repair which is spoken of in the cases as being admissible to qualify the covenant to keep in repair does not mean a want of repair in respect of fittings and accessories of the demised premises, but of the structure in general. If this be the true view it does not seem to follow that evidence of want of repair in detail is not admissible to show the general state of the structure, but that, except so far as such evidence shows a general decay of the structure, it is not available to diminish the amount of the repairs which the covenant must be taken to have contemplated.—*Solicitors' Journal*.

*Counsel's Liability for Negligence.*—Mr. Norwood has given notice of his intention to move in committee on the Judicature Bill a clause providing that "Every barrister-at-law retained or employed by or on behalf of any suitor in either of the said Courts, and accepting any brief or instructions to act as counsel on behalf of or to advise any such suitor, shall be entitled to sue for his fees earned in respect of such employment as for work and labour done on behalf of such suitor," and this motion, we are informed, will be seconded by Mr. C. E. Lewis. The object of this clause, not quite apparent on the surface, is to fix on barristers a similar liability to an action for negligence to that which exists in the case of solicitors. Before a proposal for a change of this magnitude is placed before Parliament it may be well to consider the nature of the evil complained of, and whether the remedy proposed is likely to prove successful.

As to the chief grievance, we imagine there can really be no two opinions. Every dispassionate person must admit that the system of handing over briefs, upon which large fees have been paid, to other counsel who know little of the case, and do not possess the professional acquirements of the counsel originally instructed, is wholly indefensible, and exists merely because what one man has done another thinks he may do. But will a provision rendering barristers liable for negligence have the effect of stopping the practice? Let us see how it would work. The wrongdoers are invariably men of eminence, for no others can venture to run the risk

of offending their clients by handing over briefs to another. Now, such men can practically dictate their own terms, and what have they to do to avoid the enactment but to instruct their clerks never to accept a retaining fee except on the express condition that if they are unable to conduct the case they shall be at liberty to employ a substitute? Would a leading counsel lose a single guinea by adopting such a course? We trow not, for clients in important cases are usually determined to have the best legal ability they can get, and their solicitors will bolster up the chance of the eminent counsel not appearing by the employment of strong juniors. Even in the unlikely case of a barrister being sued for negligence of this kind, could he possibly be convicted? To suppose that he could, assumes that it could be proved the case was lost by his non-appearance; how, then, are the judge and jury to estimate the effect his pathetic or stirring appeals, or searching cross-examination, might have produced? Is evidence to be given of the ability usually displayed by the negligent counsel, and of the want of ability displayed by his substitute? Is the negligent counsel to be allowed to adduce evidence similar to that given by a male defendant in a breach of promise case, that he really is a person of little power or ability, and that the loss of his services was of no importance? The thing is obviously absurd. The true mode of putting an end to the practice complained of is that indicated by Mr. C. E. Lewis himself in one of his addresses delivered two years ago, when he suggested that "this scandal would not have existed six months if the Council of the Incorporated Law Society had gone to the judges and benchers, and had insisted on the fair and honourable division of labour which had so long existed in the Court of Chancery." There could be no more proper subject for the efforts of the Law Society, and no better time for urging the matter than the eve of the commencement of a new procedure.

We have dealt with the grievance most frequently alleged, but the proposed clause would cover all negligence in the conduct of actions. That clients should have a remedy for loss occasioned by the negligence of counsel is undeniable *theoretically*. But whether the change would, on the whole, be a practical advantage depends upon many considerations which do not lie on the surface. This, at all events, should not be lost sight of, that the negligence must be the cause of the unsuccessful issue of the action or proceeding. We all know how difficult it is to prove actionable negligence in the case of a solicitor who has the conduct of a whole matter from the commencement; would it not be tenfold more difficult to prove it against a barrister when the case comes to his hands already shaped and moulded by his legal client? How much of the unsuccessful issue of the case was due to inadequate instructions, negligence in getting up the facts, absence of the solicitor from court during the hearing, or the like, must necessarily be a subject of dispute, and would invariably be raised in every action



against counsel. In the midst of all this cloud of charge and counter-charge the remedy of the party would be likely, in the vast majority of cases, to wholly disappear. The subject is one of much complication, and ought to receive from all sides most careful and dispassionate consideration.—*Solicitors' Journal*.

*The Vacant Judgeship.*—The summer Session has closed, we have entered upon the long vacation, and the vacancy on the Bench remains unfilled. Our anticipations of last month as to the probable acceptance of the post by Lord Advocate Gordon have not as yet been verified, and nothing is certainly known as to the intentions of the Government. Perhaps Mr. Smee's ingenious invention mentioned in the June number of the *Journal* has been brought under their consideration; and the possibility of a mechanical Judge is embarrassing their councils, and contributing to the delay.

*The Ballot Act.*—It has long been doubtful how far the Ballot Act, and the minute provisions of its schedules, must be taken to be imperative, and how far directory. Especially has it been questioned whether the voter must fill up his ballot paper with the statutory cross, or whether any and what other mark ought to be held sufficient. In the Wigtown case (*Haswell v. Stewart*, 4 Sess. Cas. vol. i. p. 925), it will be remembered that a majority of the Scotch Judges took a very severe view of the question, and held, although a badly formed cross would do, a mere line would not, and that a superfluous cross or a cross placed to the left instead of the right hand of the candidate's name, would render the vote invalid. The Court of Common Pleas, however, has just taken a far more lenient, and we think a far more sensible view. In *Woodward v. Sarsons*, a case arising out of the Birmingham Municipal Election petition, twenty-two ballot papers were objected to on various grounds, more or less similar to those taken in the Wigtown case. But in a written and considered judgment, the Court (Brett, Denman, and Archibald, J.J.) has held that, though writing the voter's initial or the favoured candidate's name will invalidate a ballot paper, the voter is not tied hand and foot to the statutory fashion of designating his intention how to vote. Superfluous crosses, misplaced crosses, and crosses which have failed in the making are no longer [in England] to be void for uncertainty. The correctness of this judgment will be obvious to any person who will take the trouble to peruse the "form of directions for the guidance of the voter," which is contained in the second schedule to the Ballot Act. "If the voter," it is there explained, "votes for more than — candidate, or places any mark on the paper by which he may be afterwards identified, his ballot paper will be void, and will not be counted." That is, ballot papers are either to be bad for uncertainty, or bad for fraud. Neither the voter whose pencil fails at the critical moment, nor the voter who makes more crosses than one, can

be said to have executed ballot papers which are bad for uncertainty. Then could such ballot papers be bad for fraud? To hold this would be to say that any deviation whatever from the statutory fashion ought to invalidate the vote. And even the Scotch Judges held "that a cross with the addition of small strokes, so as to resemble the letter X, will not render the vote null." It is satisfactory to learn that to exercise the franchise it is not necessary to have taken lessons from a drawing-master.—*The Law Times*, July 17, 1875.

[Our readers may remember that the construction adopted by the English Judges was contended for in an article in the number of the *Journal* for April 1874.]

*Autumn Vacation Arrangements—The Circuits.*—The following are the arrangements for the Autumn Circuits:—

*South.*—Lords Justice-Clerk and Young. *Ayr*—Wednesday, 1st September, at 11 o'clock. *Dumfries*—Friday, 3rd September, at 11 o'clock. *Jedburgh*—Wednesday, 8th September, at 11 o'clock. W. E. Gloag, Esq., Advocate-Depute; Æneas Macbean, Clerk.

*North.*—Lords Deas and Mure. *Dundee*—Wednesday, 1st September. *Perth*—Tuesday, 7th September. *Inverness*—Tuesday, 14th September. *Aberdeen*—Friday, 17th September. Roger Montgomerie, Esq., M.P., Advocate-Depute; William Hamilton Bell, Clerk.

*West.*—Lords Ardmillan and Neaves. *Glasgow*—Friday, 10th September, at 12 o'clock noon. *Inveraray*—Wednesday, 22nd September. *Stirling*—Monday, 27th September, at 12 o'clock noon. James Muirhead, Esq., Advocate-Depute.

*Bill Chamber Rotation of Judges.*—Wednesday 21st July to Saturday 31st July, Lord Gifford. Monday 2nd August to Saturday 14th August, Lord Shand. Monday 16th August to Saturday 28th August, Lord Craighill. Monday 30th August to Saturday 11th September, Lord Curriehill. Monday 13th September to Saturday 25th September, Lord Ormidale. Monday 27th September to Saturday 9th October, Lord Gifford. Monday 11th October to meeting of the Court, Lord Shand.

*Box Days.*—Thursday 26th August and Thursday 23rd September have been appointed the Box days in vacation.

*Court Days in Vacation.*—A Judge will sit in Court on Wednesday 1st, and on Wednesday 29th September, each day at 11 o'clock a.m., for the disposal of motions and other business falling under the 93rd section of the "Court of Session Act 1868."

*Appointments.*—We understand that ROBERT LEE, Esq., Advocate, has been appointed Sheriff of the Counties of Stirling and Dumbarton in room of the late ROBERT BLACKBURN, Esq.; and that J. H. A. MACDONALD, Esq., Advocate, has been appointed Sheriff of the Counties of Ross and Cromarty, in room of GEORGE DINGWALL FORDYCE, Esq., Advocate, resigned.

*Calls to the Bar.*—The following gentlemen were admitted

Members of the Faculty of Advocates during the past month: THOMAS SHAW, LL.B. Edinburgh; WILLIAM CHARLES SMITH, LL.B. Edinburgh; ROBERT LOUIS STEVENSON; JAMES MARSHALL, LL.B. Cambridge; JAMES CATHCART WHITE, M.A. Edinburgh.

### Notes of English, American, and Colonial Cases.

**DOMICILE IN TIME OF WAR.**—*Contracts between persons belonging to belligerent powers.*—In this case the Supreme Court of the United States considered the law of domicile in time of war as affecting contracts of purchase. The facts of the case are as follows:—At the beginning of the late rebellion, Mitchell, the claimant and appellant, lived in Louisville, Kentucky. He was engaged in business there. In July 1861, and after the 17th of that month, he procured from the proper military authority of the United States, in Kentucky, a pass permitting him to go through the army lines into the insurrectionary territory. He thereupon went into the insurgent States, and remained there until the latter part of the year 1864. He then returned to Louisville. While in the Confederate States he transacted business, collected debts, and purchased from different parties 724 bales of cotton. He took possession of the cotton and stored it in Savannah. Upon the capture of that place by General Sherman the cotton was seized by the military authorities. It was subsequently sold by the agents of the government. The proceeds, amounting to the sum of \$128,692.23, are in the treasury. Mitchell bought the cotton in November and December 1864. He remained within the insurrectionary lines from July 1861, until after the capture of Savannah by the arms of the United States. The Court of Claims was equally divided in opinion as to whether Mitchell could now claim the proceeds. Swayne, J., in delivering the opinion of the Supreme Court, said: "When Mitchell passed within the rebel lines the war between the loyal and the disloyal States was flagrant. It speedily assumed the largest proportions. Important belligerent rights were conceded by the United States to the insurgents. Their soldiers, when captured, were treated as prisoners of war, and were exchanged and not held for treason. Their vessels, when captured, were dealt with by our prize courts. Their ports were blockaded and the blockades proclaimed to neutral nations. Property taken at sea, belonging to persons domiciled in the insurgent States, was uniformly held to be confiscable as enemy property. All these things were done as if the war had been a public one with a foreign nation. *The Prize Cases*, 2 Black. 687; *Mrs. Alexander's Cotton*, 2 Wall. 417; *Mauran v. The Ins. Co.*, 6 id. 1. The laws of war were applied in like manner to intercourse on land between the inhabitants of the loyal and the disloyal States. It was adjudged that all contracts of the inhabitants of the former with the inhabitants of the latter were illegal and void. It was held that they conferred no rights which could be recognized. Such is the law of nations *flagrante bello* as administered by courts of justice. Vattel, § 220; *Griswold v. Waddington*, 16 Johns. 438; *Coolidge v. Guthrie*, 8 Am. Law Reg. (N. S.) 20; *Coppel v. Hall*, 7 Wall. 542; *Grosmyer*, 9 id. 72; *Montgomery*, 15 id. 400; *Lapins & Ferré*, 17 id. 602; *Cutner*, id. 516. While such was the law as to dealings between the inhabitants of the respective territories, contracts between the inhabitants of the rebel States not in aid of the rebellion were as valid as those between themselves of the inhabitants of the loyal States. Hence this case turns upon the point whether the appellant was domiciled in the Confederate States when he bought the cotton in question. When he took his departure for the South he lived and was in business in Louisville. He returned thither when Savannah was captured and his cotton was seized. It is to the intervening tract of time we must look for the means of solving the question before us.

There is nothing in the record which tends to show that, when he left Louisville, he did not intend to return, or that while in the South he had any purpose to remain, or that when he returned to Louisville he had any intent other than to live there as he had done before his departure. Domicile has been thus defined: 'A residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time.' *Guer v. Daniel*, 1 Binn. 349, *note*. This definition is approved by Phillimore in his work on the subject—page 13. By the term *domicile*, in its ordinary acceptation, is meant the place where a person lives and has his home. *Story's Confl.*, § 41. The place where a person lives is taken to be his domicile until facts adduced establish the contrary. *Bruce v. Bruce*, 2 Bos. & Pull. 228, *note*; *Bampde v. Johnstone*, 3 Ves. 201; *Stanley v. Bernes*, 3 Hagg. Eccl. Rep. 374, 437; *Best on Presumptions*, 235. The proof of the domicile of the claimant at Louisville is sufficient. There is no controversy between the parties on that proposition. We need not, therefore, further consider the subject. A domicile once acquired is presumed to continue until it is shown to have been changed. *Somerville v. Somerville*, 5 Ves. 787; *Harvard College v. Gore*, 5 Pick. 370; *Wharton's Confl. of Laws*, § 55. Where a change of domicile is alleged the burden of proving it rests upon the person making the allegation. *Crookenden v. Fuller*, 1 Sw. & Tr. 441; *Hodgson v. De Buchesne*, 12. Moore's P. C. 288 (1858.) To constitute the new domicile two things are indispensable: First, residence in the new locality; and, second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicile for another. Until the new one is acquired, the old one remains. *Wharton's Confl.*, *supra*, and the authorities there cited. These principles are axiomatic in the law upon the subject. When the claimant left Louisville it would have been illegal to take up his abode in the territory whether he was going. Such a purpose is not to be presumed. The presumption is the other way. To be established it must be proved. 12 Moore's P. C., *supra*. Among the circumstances usually relied upon to establish the *animus manendi* are: Declarations of the party; the exercise of political rights; the payment of personal taxes; a house of residence, and a place of business. Phillimore, 100; *Wharton*, § 62, and *post.* All these indicia are wanting in the case of the claimant. The rules of law applied to the affirmative facts, without the aid of the negative considerations to which we have adverted, are conclusive against him. His purchase of the cotton involved the same legal consequences as if it had been made by an agent whom he sent to make it. Obviously, important further facts bearing on the question might easily have been put in evidence by either party. We regret that it was not done. As the case is presented, our conclusion is necessarily adverse to the appellant."—*Mitchell v. United States*.—*Albany Law Journal*.

**CORPORATION.—Liability of officers for salaries of agents.**—This action was brought by plaintiff to recover an amount alleged to be due for salary. It appeared that deft. S. held himself out to be the president of a corporation duly organized, and employed plaintiff to act as its superintendent. Deft. R. thereafter, supposing the company to be legally incorporated, subscribed and paid in 5000 dollars, and was elected president. He notified plaintiff of his election, and directed him thereafter to report to him. Plaintiff drew drafts on R., as president, to carry on the business, which R. accepted, and which were paid by the acting treasurer. The business proved to be a failure and was abandoned, and R. gave the directions as to the disposition of the books. The corporation never in fact existed. It did not appear that this fact was known to R. before the business was abandoned. *Held*, that R. was not liable, that in order to charge him it was necessary to show that he was acting as a partner in the enterprise at the time the contract with plaintiff was made. *Fuller v. Rowe*, impleaded, &c.—Court of Appeals, New York St.—*Albany Law Journal*.

**SUBSTITUTED SERVICE.—Wife's petition—Husband in prison.**—The husband, the respondent in the suit, was a convict in Portland Prison, and could not be served personally with the citation and petition. Sir James Hannen declined to make an order for substituted service on the governor of the prison, unless it could be shown that by means of such service the papers would reach the respondent.—*Bland v. Bland*, 44 L. J. Rep. (P. and M.), 14.

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## The Scottish Law Magazine and Sheriff Court Reporter.

### SHERIFF COURT OF INVERARAY.

Sheriffs IRVINE and HOME.

**M'TAVISH v. THE COMMISSIONERS OF THE CALEDONIAN CANAL.**

*Sheriff Court—Jurisdiction—Service—Citation—Poor Law Act, 8 & 9 Vict. c. 83—General and Private Act.*—Held that a corporate body, with the chief office in London, but carrying on business in a Scotch county, is subject to the jurisdiction of the Sheriff, and that service of a summons at the office where the business is carried on is sufficient. Held also that a general Act of Parliament (Poor Law Act) overrides the provisions as to exclusive jurisdiction contained in a private Act.

*Poor Rates—Recovery—Powers of Sheriff.*—Held, in an action for payment of poor rates, that the Sheriff has no power to inquire into the question whether or not the deductions allowed by a Parochial Board, under section 37 of the Poor Law Act, 8 & 9 Vict. c. 83, are sufficient in assessing for poor rates, and decree granted *de plano* for the sums pursued for.

This was an action at the instance of the Parochial Board of the parish of North Knapdale, Argyllshire, against the Commissioners of the Caledonian Canal, to recover payment of poor rates and registration assessment for the years from 1865 to 1873 inclusive, amounting to £568, 19s. 11½d., in respect of the defrs. being owners and occupiers of the Crinan Canal. The following interlocutors have been pronounced by the Sheriffs, and fully explain the nature of the action, which is one of considerable general importance:—

*"Inveraray, 26th October 1874.*—The Sheriff-Substitute having heard parties on the preliminary defences, and made avizandum, repels the first and second pleas in law for the defenders, and appoints the case to be put to the roll of debates, to be debated on the merits.

GEORGE HOME.

*"Note.*—This case is raised by the inspector of poor for the parish of North Knapdale for the recovery of poor rates from the Commissioners of the Caledonian Canal. The defrs. plead (1) That the Sheriff has no jurisdiction; and (2) That the summons has not been properly served.

*"(1)* In support of their first plea the defrs. rely on the Acts 43 Geo. III. c. 102, sec. 37, and 44 Geo. III. c. 62, sec. 81, which subject them only to the jurisdiction of the Court of Session, and which have been reserved in general terms in subsequent Acts. It appears, however, to the S.-S. that a public general Act imposing an assessment must override the provisions of other Acts so far as they are inconsistent with it, unless they are specially excepted. And as jurisdiction is given to the Sheriff by the Poor Law Act without any exception, the defrs. must be held to be subject to it.

*"(2)* As regards the service of the summons, the Lands Clauses Consolidation Act, 1845, and the Commissioners' Clauses Consolidation Act, 1847, are both incorporated with the defrs.' Act, 23 & 24 Vict. c. 46; and the former by sec. 128, the latter by sec. 99, allows service to be made by leaving a summons at the principal office of Commissioners, or at one of their principal offices, if there be more than one. In this case the summons was left at the Commissioners' office at Ardrishaig, which is clearly a principal office of the Commissioners,

and the S.-S. has no doubt that the statute applies, and that it has been complied with. G. H."

"*Edinburgh, March 23, 1875.*—The Sheriff having heard parties' procurators on the defrs.' appeal against the interlocutor of 26th October last, and considered the record, dismisses the appeal, affirms the interlocutor appealed against, and decerns.

ALEXR. FORBES IRVINE.

"*Note.*—The preliminary defences which alone fall to be dealt with at this stage are two in number: 1st, No jurisdiction; 2nd, No process. These pleas are necessarily connected, but may be noticed separately.

"The first, that of no jurisdiction, is founded on certain provisions in the long series of Acts of Parliament by which the Caledonian and Crinan Canal Companies were originally constituted, and by which their management has from time to time been regulated. By certain of these statutes, and particularly by 43 Geo. III. c. 102, sec. 37 (1803), and 44 Geo. III. c. 62, sec. 81 (1804), it is provided that 'no action or suit shall be commenced by any person or persons for anything done by virtue or in pursuance of these Acts,' until certain conditions as to notice, and as to tenders or satisfaction to the parties aggrieved, shall have been fulfilled, and a direction follows that every such action shall 'be brought before the Court of Session in Scotland.'

"It does not appear that these provisions, even supposing that they are still in full observance, are sufficient to exclude the jurisdiction of the Sheriff Courts in such a question as the present. They no doubt afford direction for what may be called the machinery of the company, its constitution and internal management, with reference to those things which it was the primary object of these statutes to regulate. But in all questions, whether affecting private partnerships, companies, or corporations, the general rule is that the ordinary tribunals have jurisdiction, and it seems clear that enactments, far more definite and express, would be required to exclude the ordinary courts of the country, acting under a general statute, such as the Poor Law (Amendment) Act, 8 & 9 Vict. c. 83. That statute was passed long subsequently to the Canal Acts, and is intended to affect all lands and heritages in Scotland, in which country the corporation possesses property, in which its whole executive is carried on, and its revenues collected and applied. There is here no real inconsistency. These directions of the old Acts may remain entire as to the rights and duties of the corporation, as there set forth, without prejudice to the full operation of the ordinary courts in so far as regards a general assessment imposed from without, the Poor Law Amendment Act expressly providing, by sec. 88, that all such assessments 'shall be recoverable in the Sheriff Courts.'

"The second preliminary plea, that of no process, is founded on a direction that, before action commenced by virtue or in pursuance of these Acts, thirty days' notice shall be given to the commissioners, whose office is stated to be at Westminster. But important alterations have been made in the constitution and management of the corporation by the Act 11 & 12 Vict. c. 54, by which an entirely new body of commissioners is constituted, and by the Act 20 & 21 Vict. c. 27. Finally, the Act 23 & 24 Vict. c. 46, secs. 3 and 4, incorporates the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Commissioners' Clauses Act, 1847 (10 & 11 Vict. c. 16)—the former Act providing by section 128, and the latter by section 99, that service may be made at the principal office of the commissioners, or at one of the principal offices, if there be more than one. In the present case the summons was left at the commissioners' office at Ardrishaig, which the Sheriff concurs with the S.-S. in holding is clearly a principal office of the commissioners.

"But even supposing it is not a *principal* office, still, if the same rules are to be applied to canals as to railways, and there seems to be no difference in principle between carriers by water and carriers by land, Ardrishaig is admittedly an office of the commissioners where they carry on business, and have a collector and clerk, so that service there would at common law be good and sufficient (*Aberdeen Railway Company v. Ferrier*, Jan. 28, 1854, 16 D. B. M.

422; and *Dick v. Great North of Scotland Railway Company*, Oct. 8, 1860, 3 Irvine, 616. These cases are the more remarkable, as showing that even a statutory enactment requiring a railway company to be cited at its head office does not take away the jurisdiction of the Sheriff in which the railway has a station. A. F. I."

"*Inveruray*, 29th April 1875.—The S.-S. having heard parties' procurators, and made avizandum: Finds, as regards the conclusion for poor rates, that the Sheriff's duties are only ministerial, and that the defra.' pleas, as to the assessments being imposed on too large a valuation, cannot therefore be entertained in the Sheriff Court; and as regards the conclusion for registration assessments, in respect the pursuer's procurator stated at the debate, that to avoid a proof he was willing to take decree for the amount admitted in the defra.' answer to articles 16 and 17 of the condescendence: Finds the pursuer entitled to the sum of £12, 0s. 9d. under this head: Therefore decerns against the defra. for the sums of £555, 18s. 3½d. of poor rates, and £12, 0s. 9d. of registration assessments, with interest from the time of each assessment falling due in terms of the conclusions of the summons: Finds the pursuer entitled to his expenses: Appoints an account to be given in, and remits the same, when lodged, to the auditor to tax and report. GEORGE HOME.

"*Note*.—It seems to the S.-S. sufficiently settled by the cases of *Calder v. Trotter*, 8th June 1833, 11 S. 694, and *Pollock*, 12th Nov. 1833, 12 S. 14, that the Sheriff's duties as regards the recovery of assessments under the poor law are purely ministerial, and he sees no reason to doubt that the law, as laid down by these decisions, is as much in force as ever, though he understood the defra.' procurator to suggest that this was not the case. It is therefore beyond his power to inquire into the justice of the assessment; the defra.' objections to it may possibly enough be perfectly good, but they cannot be entertained in the Sheriff Court. If, however, they are not good, and this is the view the S.-S. is bound to proceed on, the assessments should have been paid long ago, and the S.-S. cannot therefore see any reason why the conclusion for interest should not be given effect to. G. H."

"*Edinburgh*, 7th July 1875.—The Sheriff having heard parties' procurators on the defra.' appeal against the interlocutor of 29th April, and considered the closed record, productions, and whole process, dismisses said appeal, affirms the interlocutor appealed against, and decerns. ALEX. FORBES IRVINE.

"*Note*.—This is an action for payment of certain assessment for the support of the poor, and for registration purposes under the Acts 8 & 9 Vict. cap. 83, and 17 & 18 Vict. cap. 80. The defra. plead that the deductions to which they are entitled under section 37 of the Poor Law Amendment Act have not been made to the full extent, and they contend that had they been so made no assessable value would have remained on which rates could be imposed. The immediate question is whether the matter of this defence may competently be inquired into in the Sheriff Court. It seems clear that where the parochial board adopts the summary mode of recovery authorized by section 88 of the statute, the Sheriff acts ministerially rather than judicially. On production of sufficient evidence that the assessment remains unpaid warrant is usually granted as matter of course; and the only competent remedy is suspension of that decree. But does this necessarily hold where the parochial board, leaving the summary method authorized by the Act, proceeds by ordinary action in the Sheriff Court? Where, as in the present case, objection is taken, going substantially to the legality or illegality of the mode of assessment; and a question is thus raised whether that which has been done is within the powers of the the parochial board, it may be argued that the Sheriff must have jurisdiction to entertain and determine the point, 'because it truly resolves into the question whether or not the case is one which authorizes him to interpose.'

"It appears to the Sheriff that there would be much force in this argument could the question be considered as still open. But the plea was urged unsuccessfully in two cases already referred to in the course of these proceedings,

viz., *Calders v. Trotter, James and Pollock v. Robertson*, Nov. 12, 1838. In the latter case the plea maintained for the defrs. had the high sanction of the Lord Ordinary Fullerton, but failed to convince the Judges of the First Division, who unanimously altered the interlocutor. It is true that these judgments were given before the passing of the Poor Law Amendment Act of 1845; but it does not appear that this affects their application. The parochial board comes substantially into the place of the heritors and ministers in matters relating to the relief of the poor; and by section 40 of the Act remedy is reserved to any one who considers himself aggrieved by any assessment, 'in the like form and on the same ground as, at the date of the passing of the Act, was competent to any party who considered himself aggrieved by any assessment imposed under the statutes then in force for the relief of the poor.' Nor is it unimportant to observe that for the thirty years during which the Act has been in force, and amidst the many questions that have arisen under it, no decision has been pointed out controverting the principle involved in the earlier cases referred to.

"A. F. I."

*Act.—D. MacLachlan.—Alt.—W. Douglas.*

## SHERIFF COURT OF LANARKSHIRE AT GLASGOW.

Sheriffs DICKSON and GUTHRIE.

WALLS AND CO. v. GREENSHIELDS AND CO.—28th May 1875.

*Sale note—Sale of defrs.* "whole make," being "about five tons per month"—*Continuing contract—Warranty.*—This was an action of damages for £350 for breach of a contract entered into on 12th September 1871, in terms of the following sale note:—"Sold to Messrs. Wm. Walls & Co., for account of Messrs. J. Greenshields & Co., about five tons paraffin scales per month, being all the latter's make from now till end of March next, at the price of 4½d. per lb." The pursuers maintained that the defrs. had become bound to deliver five tons per month, and claimed damages in respect of their refusal to deliver the difference between 332 cwt., the total quantity delivered, and 650 cwt. The defrs. delivered all their make; but it appeared that the quantity of scales, which depended on the quantity of paraffin oil produced at their works, had been somewhat less than usual owing to the mildness of the winter of 1871-2.

The following interlocutors were pronounced:—

"*Glasgow, February 22, 1875.*— . . . Finds that, according to the true construction of the sale note, No. 7-1 of pro., the defrs., Greenshields & Co., sold to the pursuers on 12th September 1871 their whole make of paraffin scales from that date till the end of March 1872, and that the words 'about five tons . . . per month' in said sale note are merely demonstrative, and do not imply any warranty as to the quantity of defrs.' make; therefore, and in respect it is not averred that the defrs. did not deliver to the pursuers their whole 'make' of paraffin scales during said period, assolziez the defrs., &c.: Finds the pursuers liable, &c.

"*Note.*—This case cannot, I think, be distinguished in principle from those of *Givillini v. Daniel*, 2 C. M. & R. 61, and *M'Connell v. Murphy*, L. R. 5, P. C. 203, cited by the defrs. The only difference, viz., that the specification of quantity precedes the mention of the thing sold, does not seem to be material. If parties wish to introduce a warranty or absolute condition into their contracts, they can do so by using apt and distinct words; and there is no reason to doubt that where it is intended to introduce an absolute obligation as to quantity into a continuing contract, mercantile men are in the habit of expressing it in such perspicuous language as generally to prevent disputes.

"In the view which I have taken of the case, it is unnecessary to consider the other questions, which were very ably discussed. But the cases of *Ugle v. Vans*, 37 L. J., Q. B. 77, L. R. 3, Q. B. 272, and *Tyers v. Rosedale Iron Company*,



L. R., 8 Ex. 305, rather tend to show that, assuming damages to be due, they ought to be assessed as at the time when the defrs. refuse further delivery, and not as the defra. argued as at each monthly failure."

The pursuers appealed.

The Sheriff, on 28th May, "for the reasons assigned by the S.-S., and in the note hereto," adhered. The Sheriff added this note:—

"This case might be safely decided on the same principle as *Givillini v. Daniel and M'Connell v. Murphy*, referred to by the S.-S., to which it is closely analogous.

"The following considerations support the same view:—

"1. The defrs. are manufacturers, not merchants, and the only thing which the contract indicates their intention to sell is scales of their own 'make.'

"These were a residual product with which, as made by themselves, the defra. were familiar, and for producing which they had means. To hold them bound to enter the market and buy scales of other makers, which they could not be assured of obtaining at all, and over the cost of which, if obtained, they had not control, would introduce an element of speculation into the contract which is not consistent with its true character.

"2. The contract does not define or suggest any standard of quality by which the scales of other makers, if offered in implement, could have been tested.

"3. The place of manufacture involves the expense of carriage (as the scales were to be delivered in Glasgow), which might be much greater as to scales of other makers than of the defrs.'

"4. The elastic term 'about' shows that the parties had not a definite idea as to the quantity which the defrs. might be able to supply, and that the pursuers took their chance of its being less than five tons a month. This is the more important from the fact that the amount producible depends to a considerable extent on the weather, and that one cause of the small quantity produced by the defrs. was that the winter of 1871-2 was unusually open.

"5. The pursuer's manager, Bishop (whose evidence on the point may be considered as it was received without objection), admits that he did not expect to get any person's scales except the defrs.'

"6. The pursuers did not call on the defrs. during the continuation of the contract to supplement the deficiency in their own make by scales from other works. This indicates that their understanding of the contract was that for which the defra. contend."

*Act.—Nairnith.—Alt. Mackenzie.*

#### Before Sheriffs DICKSON and GUTHRIE.

DEANS v. PINKERTONS' TRUSTEES, ETC.—June 9, 1875.

*Sale—Delivery—Order—Bankruptcy—Stamp.*—Robert Deans, farmer, Dovehill, Pollokshaws, presented this petition against James Pinkerton & Son, grain-dealers (who became bankrupt), and Thomas Mann, a storekeeper in Glasgow, setting forth that, on 27th May 1874, he warehoused with Mann 106 bolls wheat, and received an acknowledgment as follows: "17 James Watt Street, 27th May 1874. Received on account of Mr. Robert Deans, 106 bolls wheat, and holds the same to his order. (Signed) John Bell." That a few days after, James Pinkerton, junr., one of the resp'ts. got the petr. to write his name on the back of the paper, and took it away without his consent; that Pinkerton & Son alleged they had purchased the wheat, but if so they were at the time hopelessly insolvent, and that the wheat remained the untransferred property of petr., and he claimed interdict against Mann delivering the wheat to the resp'ts., and an order on them to deliver to the petr.

A proof was led, the import of which appears in the following interlocutor of the S.-S. :—

*“Glasgow, 11th May 1875.—Finds, that in the month of May 1874, the petr. sold to James Pinkerton & Son, grain merchants, Glasgow, his last season's wheat at the price of 29s. per boll, the boll being understood to be 240 lbs. weight; and that on the 27th May and two preceding days, the said wheat, amounting to 106 bolls, was placed by the petr. in the stores belonging to the respt. Mann, in James Watt Street, Glasgow: Finds, that in the ordinary course of business it would have been stored in name of James Pinkerton & Son, the purchasers, but in consequence of their discount account at the National Bank, Argyle Street, having been stopped on the 25th May, the purchasers, who were thus led to contemplate their having to stop cash payments, directed the storekeeper's receipt (No. 13 of process) to be made out in name of the petr. and sent to him: Finds, that immediately thereafter, the purchasers, who had accounts with two other banks, resolved to continue to carry on business, and did carry on business as usual until the 11th of June, when a meeting of their creditors was called: Finds, that they were sequestrated on 25th June thereafter: Finds, that the receipt (No. 13) having been received by the petr. on the 27th May, on the 29th James Pinkerton, junr., a partner of the said firm of James Pinkerton & Son, called for the petr. when passing his farm, got him to indorse the receipt (No. 13), and took it away with him; that he afterwards wrote a delivery order in favour of James Pinkerton & Son above the petr.'s name, and intimated the same to the storekeeper, in consequence whereof the wheat was transferred in the storekeeper's books into their name: Finds, that the petr. on the following Wednesday, June 4th, got payment from the bankrupts of £20 to account of the price of said wheat: Finds, that in signing his name as aforesaid, the petr. understood that he was giving J. Pinkerton & Son control over the wheat, as he had intended to do from the first; and that it is not proved that he was induced to do so by any fraudulent representations on the part of the bankrupts: But finds that the delivery order in question being unstamped, cannot be admitted as good, useful or available in law or equity: Finds, therefore, that by intimation of the said order, the storekeeper did not, as in a question between the petr. and the bankrupts, cease to hold the wheat for the petr., and that the property in said wheat was not passed to the bankrupts: In respect of the foregoing findings, finds the petr. entitled to interdict as craved, and appoints the cause to be enrolled in the Motion Roll of May 13th, for further procedure.*

*“Note.—Although the S.-S. has come to think the want of a stamp on the delivery order fatal to respts.' case, he has thought it right, especially as that question is new and not unattended with difficulty, to make findings on the whole facts, so that, if a different view should be taken on appeal, his judgment on the whole case may be before the Court. It is quite obvious from the petr.'s evidence as recorded, and it was still more plain from his demeanour when examined, that he was feigning a degree of simplicity and ignorance which he does not possess. The account of the transaction given by the Pinkertons, and set forth in the interlocutor, is the more natural and reasonable version of it. When the Pinkertons, who were, fairly enough, disposed not to take the wheat on the eve of stopping payment, resolved to continue their business, they went in ordinary course to the petr., and asked him to indorse to them the receipt that had been granted to him, and it required no explanation, even on his own showing, beyond a simple statement that a mistake had been made, to induce him to do so. Perhaps, if the bankrupts had then been fully aware of their insolvency and imminent bankruptcy, and if there were evidence (as there is not) of any false representation made by them to induce the petr. to sign his name, such active interference to bring about the delivery of the goods might infer such fraud as to prevent property from being passed by the constructive delivery so obtained. But nothing is here proved beyond the petr.'s ready indorsation of the receipt at their request, and almost as a*

matter of course, for the purpose of correcting an apparent mistake, and carrying out the original intention of the parties.

"It was quite possible, and probably was intended by the bankrupts, that the cash transaction should be settled on the next or the following Wednesday in ordinary course, and part of the price was in fact then paid. There is nothing to show that the petr. ever thought that anything was wrong till 10th or 11th June, when he did not get his money, and got a circular from Mr. Gourlay calling a meeting of the bankrupts' creditors.

"The only question susceptible of argument in this part of the case is whether, when the goods were stored in the bankrupts' name, they were bound, in getting the receipt indorsed, to explain the whole circumstances to the petr. But the S.-S. has come to think that there was no undue concealment on the part of the bankrupts; no concealment of material facts which would not equally invalidate all their transactions with other parties between the 25th of May and their actual bankruptcy. If it was not fraudulent for them to purchase grain from other parties during that period, concealing the facts that one of their discount accounts was stopped, and that they had contemplated bankruptcy (*Richmond & Co. v. Railton*, Jan. 26, 1854, 16 D. 403, 1 Bell's Com. 244), there does not appear to be any reason why it should be held fraudulent for them to conceal these facts from the petr.

"On these grounds the S.-S. thinks that the resp't. would be entitled to absolver, had the grain in question been duly delivered to the bankrupts, but on an attentive consideration of the Stamp Act, 33 & 34 Vict. c. 97, ss. 87 *seq.*, the S.-S. is of opinion that there has been no such constructive delivery. He has given effect to this opinion, however, with some hesitation, because there is no authority on the question, and because it materially affects an important class of commercial transactions.

"The 17th section of the Act declares that no instrument 'shall be pleaded or given in evidence, or admitted to be good, useful or available in law or equity,' unless duly stamped. A delivery order must have 1d. stamp (Schedule, *s.v.* Delivery Order), and the 87th sec. defines the term as indicating a document entitling a person, or his assigns, or the holder, to delivery of goods in any dock, warehouse, etc., signed by or on behalf of the owner of said goods, 'upon the sale or transfer of the property therein.' By sec. 91, every delivery order 'is to be deemed to have been given upon a sale or transfer of the property in' goods, 'unless the contrary is expressly stated therein.' Now it is not stated in the document (No. 13 of process) that there was 'no sale,' or 'no transfer of property,' so that it falls within this imperative provision of this section, and must be deemed to have been given upon a sale or transfer of the property.

"Apart from the 91st section it might, perhaps, be held that the delivery order, though not given 'upon a sale,' (for the sale had taken place before the grain had been stored or the receipt for it given), had been granted on a 'transfer of the property therein.' Doubtless the giving and intimation of the order and the storekeeper's acceptance of it constituted delivery, and therefore in the law of Scotland operated 'a transfer of the property' in the wheat. But the statute contemplates a delivery order given on a transfer of the property, and not a delivery order effecting a transfer of the property; and therefore it can hardly be maintained that, apart from the 91st section, this delivery order would be invalid in Scotland. It seems really to be intended by the 87th section to subject to this duty all delivery orders which are given upon the sale or transfer of the *right* of property, *e.g.*, by donation, barter, or any sort of contract or assignation. As, however, the terms of the 91st section are plain and explicit, it is unnecessary to rest the judgment on any other ground.

"The only other point under the Stamp Act which the S.-S. has had to consider is the provision (s. 91, 2), that no delivery order 'is to be deemed invalid in the hands' of the warehouse-keeper. He thinks that this provision is introduced solely for the protection of the storekeeper, as is shown by the proviso 'unless such person (*i.e.* the warehouse-keeper), is proved to have been

party or privy to some fraud on the revenue in relation thereto.' It does not therefore exclude, in regard to delivery orders so far as the grantor and grantees are concerned, the operation of the general rule laid down in the 17th section of the Act, but it exempts from that general rule, except in the case specified, 'the person having the custody of, or delivering out the goods, wares or merchandise therein mentioned,' who has had no part in the making or issuing of the unstamped document, and who might, perhaps, but for this provision, be made personally responsible to the grantor or the grantor's creditors for the value of the goods wrongfully delivered out.

"It might, perhaps, be contended that the declaration that the delivery order shall not be deemed invalid in the hands of the warehouse-keeper, import generally that no invalidity shall attach to it after it has been acted on; i.e., that after the warehouse-keeper has innocently accepted the order and transferred the goods or delivered them out to the grantee. This interpretation, however, makes the proviso at the end of the sub-section absurd, or at least inconsistent, for it cannot be explained why the storekeeper's privity to the fraud on the revenue committed by the parties to the delivery order should invalidate the document, which is not avoided in this view by a similar fraud on the part of its maker and receiver. The only reasonable construction of this 2nd sub-section appears to be, that in any question with respect to an innocent storekeeper's liability for goods delivered out or transferred under an unstamped delivery order, he is to be held safe, unless he has been privy or a party to the fraud on the revenue, while the document remains invalid and incapable of transferring any right as between the maker and receiver of it. If in the present case the defr. Mann had delivered over the wheat to the bankrupts, it would apparently have been quite in harmony with the intention of the Legislature that the parties on whom the duty is imposed (sections 89, 90) of putting on and paying for the stamp, should not only have to pay a penalty, but should also find the document unavailing for the purpose for which it was made. But that would entail upon the storekeeper the necessity of making good the loss suffered by the unpaid seller, even though he should have taken and acted upon the invalid order quite innocently, and even though he himself was deceived by a statement on the delivery order that there was 'no sale;' and the S.-S. thinks that the only purpose of this sub-section is to prevent that injustice.

"Of course, it is quite competent for the petr. in this case to tender the unstamped document in evidence, because he is using it simply for the purpose of showing fraud in the transaction of which it formed a part. *Coppock v. Bower*, 4 M. & W. 361, and other cases."

On 14th May the defrs. lodged a minute, stating that, while they did not admit that the order in question required a stamp, or if it did, that the want of it affected the respt.'s right to the grain in question, he was willing, in terms of the Act 33 & 34 Vict., cap. 97, to remove the objection by tendering the amount of the stamp duty and penalty, reserving his right to apply to the Commissioners of Inland Revenue for repetition of this sum; and he paid the sum to the Clerk of Court.

Thereafter this interlocutor was pronounced by the S.-S. :—

"*Glasgow, 14th May 1875.*—Having heard parties upon the minute for respt. and upon the state of the cause, Finds that, by payment of the penalty and stamp duty to the Clerk of the Court, the objection to the validity of the delivery order is obviated; Finds that, by intimation of said delivery order to the respt. Mann, the property of the wheat in question was transferred to the bankrupts: Therefore refuses the interdict, and assoliszes the respts., and decerns: Finds the respt. John Gourlay entitled as against the petr. to one-half of the expense of stamping the said delivery order (after deducting the original stamp duty): Finds the respts. entitled to expenses," etc.

The pursuer appealed.

The Sheriff, on 9th June 1875, "for the reasons stated by the S.-S.," adhered, adding this

"*Note.*—The petr. has only appealed against the S.-S.'s interlocutor of 14th May, but the argument of his procurator was not directed against that interlocutor (which follows from the findings in the previous interlocutor of 11th May, and from the stamping of the delivery order), but against the findings in the latter interlocutor. The Sheriff does not see how he could recall these findings under the appeal.

"But it is unnecessary to decide the case on this point of form, as the Sheriff concurs with the S.-S. that the petr. has failed to prove fraud on the part of the Pinkertons in obtaining the petr.'s indorsation to the delivery order.

"It is out of the question to suppose that a farmer of great experience living near Glasgow, like the petr., was not aware that, in indorsing that order, he gave the Pinkertons control of the wheat. The order having been taken in his own name at first, and afterwards been indorsed to them, is quite explained by the circumstance that they contemplated stopping payment when the wheat was stored, but had resolved to continue business before the order was indorsed, and they did continue business for about a fortnight afterwards.

"The petr. received part payment of the price, on the footing, of course, of the wheat having been delivered to the Pinkertons; and he consented to give a short credit for the balance.

"There is no reason why, by getting the wheat restored to him, he should have a preference over the Pinkertons' other creditors."

*Act.—Hart.—Alt.—Spens.*

#### PERTH DEBTS RECOVERY COURT.

Sheriffs ADAM and BARCLAY.

##### DICKINSON BROTHERS v. MISS ISABELLA M'DOUGALL.

The pursuers pursued for £18, 18s., the price of certain prints subscribed for by the defr. The defr. denied that she had subscribed for that particular work, and alternating that she was liberated by the *mora* in delivery. The following interlocutors were pronounced:—

"*Perth, 11th June 1875.*—Having heard parties' procurators, and made avizandum with the process, proof, and debate, Finds, as matters of fact—*First*, the defr., on 7th September 1871, did subscribe the printed document, No. 3 of process, as a subscriber for the work entitled 'The Ladies of the British Aristocracy,' to be supplied on application to subscribers only, at £1, 11s. 6d. *per part*; *Second*, prefixed to the above-quoted paragraph there was set forth that the publication was 'to be issued in twelve parts'; *Third*, there is not in the paper so subscribed any statement when delivery of the series of parts was to commence, or at what periods or intervals, or when to be completed, nor is it proved that any such statement was verbally made at the time the defr. subscribed the document, as aforesaid, or subsequently thereto; *Fourth*, No further communication passed between the parties until the 31st March 1875, when the completed twelve parts were all at once offered to the defr. at the *cumulo* price of £18, 18s., and by her rejected: Finds in law, that on the sound construction of the document, No. 3, founded on as binding on the defr., and the sole ground of action, the work for which the defr. subscribed was to be issued in twelve parts, and that periodically and within reasonable times; and that the defr. was therefore justified, after the lapse of nearly four years, in rejecting the completed work then offered to her for the first time; therefore assolvies the defr.

HUGH BARCLAY.

"*Note.*—It lay on the defr. to improbate the signature to the document, No. 3. She has failed in this, and doubtless it has her genuine signature. Her denial at this distance of time may charitably be placed to her strong

impression that she gave only one order, and that for the print of Her Majesty, and therefore that this order for the vastly more expensive portraits of the 'Ladies of Her Majesty's Court' could not have her true signature.

"The defr.'s solicitor argued for fraud on the part of the pursuers' canvasser, to the effect, that whilst admittedly ordering the portrait of Her Majesty, she was entrapped to subscribe another paper referring to a more extensive and expensive work. It is certainly not pretended that there were two subscribed orders, and so far as regarded Her Majesty's portrait, it was not necessary that there should have been a written order, seeing that the print was at the time on exhibition, and was accordingly within a few days delivered and paid for. The order for this print was in all probability given verbally, and communicated by letter from the traveller to the pursuers. It was different with the series of the Female Aristocracy. These were only in progress of execution, and therefore the publishers required a written guarantee for their enterprise. It is notorious that travellers in all departments are zealous to excess for the interest of their employers, and perhaps their own in addition, and so to secure the greatest amount of custom. It is often matter of complaint that greater quantities of commodities are sent than ordered. But the proof of fraud in this case rested with the defr., and she has not attempted any such. It is quite possible that the old lady having given one order, may by mistake, and, as is said in her friend's letter, being at the time without her usual 'aids to vision,' may have subscribed the wrong paper without ever having read its terms. But fraud in no case is to be presumed or inferred, but must be clearly established.

"The case then resolves into the character of the obligation created by the document, No. 3, and the plea of *mora* raised thereon. The note is not evidence of a *sale*, and could not of itself found an action by a subscriber against the pursuers to deliver the prints. It merely sets forth that the defr. 'authorized her name to be inserted as a subscriber for the work.' Where and by whom this authorized insertion was to be made is not stated. But at the utmost it can only imply that the defender was to receive and pay for twelve separate parts of a work of art as they were successively published and delivered.

"If this was the obligation imposed on the subscriber, the correlative obligation on the publishers was timeously to offer the work as agreed on *periodically in parts*. It cannot be permitted that this essential in the contract is to be set aside, and the whole work *in cumulo* to be forced on the subscriber at once after the lapse of nearly four years, and that without the least notice during the long interval. If four years are no avoidance of the contract, then twice that time may be equally free from objection. The pursuers say that they departed from the original and published plan, and adopted this wholly different mode of dealing, *at the desire of some of the subscribers to the portraits, but amongst whom they do not include the defr.* This of itself shows that the obligation was for periodical deliveries, and required consent to be superseded. Had the defr. died in the interval of four years, surely the pursuers cannot maintain the obligation to take and pay for the completed series would have passed on her representatives; and yet, should the obligation be held good against the defr. personally, it must have been equally so against her representatives.

"The usual mode of dealing with these divisional works is by stating that they are to be in weekly, monthly, or quarterly publication and delivery. This mode induces many to become subscribers, because the money payments are thus easily met, whilst to accomplish the purchase *in cumulo* might be beyond possibility to many persons of comparatively limited incomes, though in the end the periodical may be found by far the least economical of the two modes of dealing. In this case all that can be gathered from the promise to take the publication is, that it was to be offered *in parts*, and that within reasonable periods. It is no answer to say that the defr. suffers no damage in having the whole at once instead of in parts. She is entitled to reply that that is her concern, and such are not the terms on which she subscribed, and that she would not otherwise have subscribed. She might have been pleased occasionally to disburse £1, 11s. 6d. for a portion of the work, though she objected to

be visited by an accumulated demand made at once, without any notice of so large a sum as £18, 18s. If she had received the 'Ladies' in lots she might have had time to study and admire them in successive detail, whereas to have an inroad of twenty-four at one time would be wholly overwhelming. Her tastes may have in the meantime altered, or she may have enriched her treasury of fine arts from other quarters, and have now no space for further additions to her picture gallery.

"In short, the S.-S. is of opinion that the pursuers were as much, or rather more, bound to give, as the defr. was to take and pay for, the publications periodically, and in parts, and always within reasonable time, and that she is not now bound to take and pay for the whole series at once after the lapse of so many years. H. B."

On appeal the Sheriff (Adam) affirmed the above interlocutor with the following

"*Note*.—On 7th September 1871, the defr. subscribed a document in the following terms, 'I hereby insert my name as a subscriber for the work entitled the "Ladies of the British Aristocracy," to be supplied on publication to subscribers only at £1, 11s. 6d. per part.' The document further bore that the work was 'to be issued in twelve parts, each containing two portraits.' The Sheriff does not doubt that the defr. is bound to take and pay for the work, provided that the pursuers have fulfilled the conditions, either express or implied, under which she agreed to take it. The defr. alleges that it was a condition of the subscription that the work was to be issued to her in parts, and that she is not bound to take and pay for the whole work at once as now tendered to her by the pursuers.

"The case appears to the Sheriff to be a narrow one, but he thinks that the defr. is right in this contention. It is convenient for many people to take and pay for a work in parts, who could not conveniently pay for the whole work at once, and who accordingly subscribe for a work so offered to them, but who would never subscribe for or bind themselves to take and pay for the whole work at once. There is no doubt that the mode of selling large and expensive works in parts, which is now extensively adopted, has been adopted for that reason, and works like the present obtain in consequence a larger circulation than they otherwise would.

"There is no evidence to show when the several parts of the work in question were issued, or ready to be issued, except that the last six engravings, or three parts, were ready in February 1875. It may have been a convenience, as Messrs. Dickinson say, to some subscribers living at a distance that the pursuers should retain the parts in their own hands till the whole work was completed, but although they adopted that course at the request of several subscribers, it was no reason for adopting it with reference to all of them without their consent. The Sheriff thinks that the pursuers were bound to have delivered the work in parts from time to time to the defr., and not having done so, he does not think that they are, at an interval of three and a half years, entitled to insist that the defr. shall now take and pay for the completed work. He therefore concurs in the interlocutor appealed from. J. A."

#### SHERIFF COURT OF STONEHAVEN.

Sheriffs WILSON and GUTHRIE SMITH.

CONJOINED ACTIONS—J. AND C. FORREST *v.* W. PATERSON AND D. CARR.—  
30th June 1875.

*Locomotive Act, 1861—Toll Dues of Locomotives on Roads.*—These were conjoined actions at the instance of Messrs. James and Charles Forrest, merchants, Lonmay, Aberdeenshire, against William Paterson, tollman at Hilldowntree toll-bar, on the South Deeside turnpike road, in the county of Kincardine,

and David Carr, solicitor, Stonehaven, clerk to the Road Trustees, for recovery of alleged overcharges for toll. In the one case the pursuers sought recovery of 6d., alleged to be an overcharge for toll illegally made by the defenders on 16th of April last, for allowing a four-wheeled waggon, drawn by two horses, belonging to the pursuers, to pass the said toll-bar, the defrs. having charged 1s. for the same, whereas, according to the table of tolls affixed to the toll-bar, he was only entitled to charge 6d. The table, as regards this case, was as follows:—"For a horse or other beast drawing any van, caravan, waggon, wain, cart, or such like carriage, with two wheels, the sum of 4d; and if with four wheels, or two horses, the sum of 6d." The question practically at issue was—What is the toll for a four-wheeled waggon drawn by two horses? The pursuers contended that, by the table, it was only 6d., reading the second paragraph as fixing the toll for two horses drawing a four-wheeled waggon at 6d., and maintained that, having been charged 1s., they were entitled to repayment of 6d. The toll authorities, on the other hand, contended that the disputed paragraph of the table meant 6d. per horse, and that the pursuers had therefore been rightly charged 1s.

In the other case, the question in dispute was as to the charge for locomotives. The toll-bar table was as follows:—"1. On every locomotive with four wheels, propelled by any power containing within itself the machinery for its own propulsion, if the locomotive does not exceed in weight two tons, 1s.; and so on, at the rate of 1s. for every 2 tons. 2. For every waggon, wain, cart, or carriage having cylindrical wheels, drawn or propelled by any locomotive—for every wheel of such waggon, wain, cart, or carriage, 1s." The pursuers, in this instance, had been accordingly charged 4s. on the day before mentioned, for a steam locomotive weighing 8 tons, and 4s. for a waggon with four wheels drawn by and attached to said locomotive. The pursuers sought repayment of 6s., which they alleged they had been overcharged, as the proper and legal toll should not have exceeded 1s. for the locomotive and 1s. for the waggon. Their contention was mainly based on the Locomotive Act of 1861, the first section of which establishes the following scale of tolls to be taken after the passing of the Act by all Road Trustees:—"For every locomotive, such a toll for every two tons weight as shall be equal to the toll by their respective Acts, made payable for every horse drawing any waggon, &c.; or, in the case of a toll being charged on the horse or horses drawing any such waggon, &c., then such a toll for every two tons that such locomotives shall weigh as shall be equal to one horse drawing such waggon, &c.; which tolls respectively shall be payable so often as tolls made payable as aforesaid for such waggon, &c., shall be payable at the same gate. For every waggon, &c., drawn by any locomotive, for each pair of wheels thereof such a toll as shall not exceed the toll made payable for two horses drawing any waggon, &c., with the same alternative as to the toll charged on horses, each wheel being equal to one horse."

The pursuers objected to the toll-bar table for locomotives and waggons attached, which they said was framed on the maximum scale authorized by the Road Act, contending that the tolls leviable were only such as were leviable on computations from the ordinary table for horses and wheels in actual use.

The S.-S. issued the following interlocutor:—

"*Aberdeen, 11th June 1875.*—Having heard parties' procurators on the whole cause, and considered the same, assoilzies the defrs. from the conclusions of the conjoined actions, and decerns: Finds the defrs. entitled to expenses, &c.

J. DOVE WILSON.

"*Note.*—The question in the first action turns on the construction of the "Locomotive Act, 1861. The pursuers produced a copy of the rates exacted at the toll in question, and the defrs., at the debate, admitted it to be correct. The point in dispute was whether it was within the trustees' powers.

"The Locomotive Act, 1861, was passed to prevent trustees from imposing prohibitory tolls on road locomotives. It narrates that certain clauses in the Turnpike Acts were all adapted to the profitable carrying of goods, and to the



laying of just and adequate tolls upon waggons or carriages drawn by locomotives, and it provides that in future all trustees should demand tolls not exceeding certain rates. The first of these rates may be taken as showing how the present dispute has arisen. The Act says that in certain cases the trustees may demand 'for every two tons which the locomotive shall weigh' a toll not exceeding the toll or tolls, by 'their respective Acts made payable,' for 'every horse drawing any waggon, &c.,' and the question is whether this means the toll which the trustees actually make payable for a horse for the time being, or whether it means the maximum which their Act makes payable.

"I think the tolls 'by their respective Acts made payable,' mean the tolls which the trustees have power in their Act to exact, and not those which they actually exact. Their Act makes the maximum payable, and if the words had been meant to refer to the rate actually exacted it would have been easy to have made them do so. The purpose of the Locomotive Act is attained by the fixing of a maximum. If the pursuers' argument were right, something more would have been attained, because it would provide that, while the trustees could never exact more than the actual proportional rate for horses, they might exact less. The power given to modify tolls payable for locomotives seems to me to show clearly that the Legislature were only fixing a maximum, and that the maximum they had in view was a certain portion of the rate exigible on horses. No other reading would give a full and fair interpretation to the words 'not exceeding' the rates 'by their respective Acts made payable.'

"The question in the second action is of no general importance. The copy of the table of tolls produced by the pursuer was admitted to be correct, with the exception that the clause in dispute is said to begin with 'For every horse,' instead of 'For a horse'—a distinction which appears immaterial. The table as it stands is not elegantly worded, but the meaning is clear enough. When it provides that, 'if with four wheels or two horses,' the rate per horse is to be sixpence, it would be odd if the words understood between 'if' and 'with' could refer to anything except the carriage. This makes the meaning clear, and I cannot find that it was beyond the powers of the Trustees (so long as they kept below the maximum) to charge more per horse for a two-horsed vehicle than they would do if the vehicle had fewer or more horses.

J. D. W."

On appeal the Sheriff-Principal affirmed the judgment of the S.-S. The following note is appended to his interlocutor:—

"*Note.*—On the 16th April 1875, the *petra* went through the Hilldowntree toll-bar with an eight-ton locomotive, having a four-wheeled waggon attached, and were charged 4s. for the locomotive and 4s. for the waggon. This is in accordance with the table of rates authorized by the Road Trustees, and which has been in use since the 20th November last.

"By the Locomotive Act of 1861 the tolls chargeable on locomotives are not to exceed, for every two tons of weight, the toll or tolls 'by their respective Acts made payable, for every horse drawing any waggon,' &c. It is contended that these words mean the tolls 'actually paid,' and that the Act only authorizes such a toll for every two tons as shall be equal to one horse, &c.

"The Sheriff is of opinion that this is not the correct reading of the statute. It is supplemental to the General Turnpike Act, and was passed, according to the preamble, for the very reason that some of the provisions of the latter were in many respects ill adapted to the levying of 'just and adequate tolls upon waggons or carriages drawn by locomotives.' It deals with steam power as a new description of traffic, and the object of the section founded on is to fix the maximum toll which the Trustees may charge, and which is to bear a certain *ratio* to the toll 'made payable' by the Local or General Act for ordinary traffic. It is plain that the maximum of the one was intended to be the measure of the maximum of the other, and that the words 'made payable' mean authorized to be levied, whether the full rates are actually paid or not.

"Indeed, the argument of the petr. comes to this—that whenever the toll on horses is reduced there must be a like reduction in the charge for locomotives. The one must always rise or fall with the other. But the circumstance, that they have already reduced the rates as regards horses, &c., does not oblige them to make a like reduction in a totally different description of traffic. The two things are quite distinct, and in fixing a maximum for each, Parliament purposely left a wide discretion to the Road Trustees. The statute does not conjoin, but merely permits, tolls not exceeding a certain amount, and so long as the Trustees keep within the assigned limit, they may charge for either horse traffic or steam traffic whatever they think proper. This was so decided in the case of *The King v. The Trustees of the Bury and Stratton Roads* (4 B. and C. 361), in which it was held that where by such a provision as is contained in the General Turnpike Act (section 33) power is given to the Road Trustees to lessen and reduce, or again to advance, the tolls allowed to be demanded, they are entitled to exercise the power as regards any one or all of the different descriptions of traffic, subject to this, that they must not reduce or advance them at one gate and not at another.

"For these reasons, the Sheriff is of opinion that the case has been rightly disposed of by the S.-S., and as to the other point regarding the somewhat elliptical notice in the table of tolls, he has nothing to add."

*Act.—D. C. Macdonald.—Alt.—R. Falconer.*

## SHERIFF COURT OF ABERDEEN.

Sheriff COMRIE THOMSON.

KERRY v. GARVIE AND CO.—15th July 1875.

*Master and servant—Right of dismissal.*—In this case Francis Kerry, moulder, sued Messrs. James Garvie, jun. & Co., engineers, for 10s. 7d., being amount of wages alleged to be due by them to him. Payment was resisted on various grounds—the allegations being that Kerry was an unskilful worker; that a pulley he had made was useless because of its unworkmanlike make; that he was far too slow at his work; and that on a specified occasion he had been markedly under the influence of drink, the inference being that he was unfit for his work. The contentions for the pursuer were, that the spoiling of the pulley was brought about through no fault of Kerry; that on the occasion alluded to Kerry had only one glass of whisky, and was not under the influence of drink; that he had not been spoken to for it at the time, and that the allegation was entirely an afterthought.

The Sheriff-Substitute, in giving judgment, said—This case opens up a question between masters and servants, which involves matters of some delicacy. It appears that this servant had been in the Messrs. Garvie's employment for about a week, and on the Saturday morning he had turned out a pulley which was nearly a quarter of an inch thicker at the one side than it was at the other. The master's attention being drawn to that, the servant denied that he was to blame, and said that it was the fault of the material which had been furnished to him. Thereupon he was dismissed, and in the course of a short time afterwards he was told that he was not to be paid the wages that were due to him for the previous eighteen hours. Now, certainly this servant was unfortunate in the combination of circumstances which occurred during these eighteen hours. It is proved that he took a very much longer time to his work than was usual. It is proved that one of the pulleys which he made was useless, and that it afterwards broke. It is said that he was under the influence of drink, and it is admitted that he smelt of drink on the morning of the Friday; and it is alleged that he is responsible for the fracture of the pattern he had been using, and which was found broken when it was

drawn from the sand on the Monday following. Now there are two rules of law which it is important to bear in mind in disposing of a case on the facts. The one is that a man in the position of a workman is bound to know the work for which he hires himself, and to do it skilfully and carefully, and within a reasonable time. If he fails in these respects he may, if engaged for a term, be dismissed, and if engaged as this man was, he will forfeit his wages. The other rule to which I wish to direct attention is, that a master is not entitled to retain without having found fault with him, and subsequently to dismiss him or to refuse him his wages, because of conduct which was known to him, but of which he took no notice. That is well settled, and is founded on equitable principle. Now, here it is not proved that this man was under the influence of drink. He smelt of it, but there is nothing in that inconsistent with the truth of his own statement that he had taken one half-gill of whisky in the morning. I have nothing to do with whether that is a proper or improper, a healthful or unhealthful thing to do ; but it does not make a man unfit for his work if he stops at that one half-gill, and there is no evidence that here the man was unfit for his work ; and, even if there was such evidence, I don't think it can be founded upon here, for the reason that the man should have there and then, or immediately upon his becoming sober, been remonstrated with, found fault with, and warned, which was certainly not done. Then, as to the broken pattern, I see no evidence whatever to connect it with this pursuer. The matter may have come from a hundred faults besides carelessness on his part, and I must say I fail to be satisfied in regard to the uselessness of the pulley which he took out that it is shown to have arisen either from want of skill or care on his part. He had worked satisfactorily in the preceding part of the week. Nothing had gone wrong with him, and it is proved that this is an accident which not unfrequently happens. Therefore the only ground for dismissal which remains is that he was slow at his work, and I think that there is a grievance. But, again, there is the remark that that slowness had manifested itself for two previous days, and should then have been made the subject of warning. If Mr. Garvie had obeyed the impulse of the moment he would have been well advised. He was tired of the man, or provoked with him. He was an unsatisfactory worker. If he had therefore said he would have no more of him, and have carried out what he proposed, and given him his money and been done with him, that would have been a much better way of doing it. Had he said, "I will take half-a-crown off your wages," I should not have found much fault with him, because he was most provokingly and unjustifiably slow ; and, if that case had been presented, I should not have upheld the pursuer's conduct. I think that the justice of this case will be properly met by decerning against the defenders for the wages earned. I shall give pursuer no expenses.

*Act.—Prosser.—Alt.—C. Duncan.*

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# THE JOURNAL OF JURISPRUDENCE.

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## THE REVISED STATUTES.<sup>1</sup>

THOUGH Bacon admitted the purging of the Statute Book was "a thing not to be done suddenly," we doubt whether, if alive now, he "would take great contentment" at the rate of progress of the Committee who have charge of issuing the Revised Statutes. They have been in office for seven years, and though much of the work was ready to their hands owing to the previous labours of the Statute Law Consolidation Commission, this, their most recent volume, brings us no further than the year 1836. However, the later the period the less the expurgation required; and we may fairly hope to see the verification of the Lord Chancellor's announcement to the House of Lords in July last, that the series will be completed early next year.

Should this explanation be fulfilled we shall then possess a complete *corpus* of subsisting statute law down to the year 1868; and the first step towards a code will be accomplished. Much, no doubt, will remain to be done, but we need not despair of the edifice one day being crowned. Forty-eight years elapsed from the day Frederick the Great entrusted the learned Cocceji with the preparation of a code based on Reason and the Constitution till the publication of the Russian *Allgemeines Landrecht* in 1794. It was in 1758 that Maria Theresa appointed a Commission to draw up a code for the Hereditary States, and though after the lapse of ten years the learned commissioners laid before the Empress the result of their lucubrations in eight volumes folio, she peremptorily set them down to the task of abridgment, and the *Bürgerliches Gesetzbuch* did not till 1812 receive from her grandson the imperial sanction. Even the French code was produced less rapidly than is generally supposed. The *Code Civil* no doubt became law four years after

<sup>1</sup>The Statutes. Revised Edition. Vol. VII. 2 & 3 Will. IV. to 6 & 7 Will. IV. A.D. 1831-1836. By authority. London: Eyre & Spottiswoode. 1875.  
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the appointment of the commission for its preparation. But, not to mention that the labours of the commissioners were considerably lightened by the total abolition of more than one department of the law by the Legislative Assembly, much of the material that remained was already partially worked up. The commissioners had before them the three draft codes submitted by Cambacères at different times to the Convention and Directory; and they incorporated, with little or no alteration, the various *ordonnances* in which Colbert and d'Aguesseau had consolidated various branches of the law during the century preceding. It must also be kept in view that the *Code Civil* embraced by no means the whole law of France, and that supplementary codes, to the number of ten, were published at intervals during the succeeding forty years.

Compared with our Continental neighbours, we labour under certain disadvantages in respect to codification. Their difficulties, though considerable, were of a different kind from ours. The great class of local laws and *coutumes* with which they had to struggle is illustrated by the remark of Voltaire, that in travelling through France you changed laws as often as you changed post-horses. And their local limits were so capriciously marked that sometimes different houses in the same street were subject to different laws. A similar prevalence of local consuetudinary laws characterised most countries of Europe. It is said that in the Canton of Zürich alone there were reckoned about twenty different systems of *communio bonorum* of married persons. But in simplifying these laws, the German and French codifiers did little else than select and adopt the local law they deemed most consonant with justice and the other parts of the code, or choosing one local law as the basis, they modified it here and there with provisions culled from other *Particularrechte* or *coutumes*. In England, on the other hand, it is not so much the mass as the kind of material that renders codification so arduous an undertaking. How to blend into one harmonious whole custom, judicial precedent and statute-law, to put for the first time into precise language certain principles generally accepted by lawyers, and transmitted by the tradition of centuries, but nowhere specifically laid down in writing, and to exhibit these in a compendious form, along with the substance of a "*multorum camelorum onus*" of reports and statutes; this is the problem that our English codifiers have to face.

The subject of statute revision has been repeatedly considered, both by the Crown and the Legislature, from the reign of Elizabeth onwards. King James I., desirous, probably, of adding the glories of Justinian to those of Solomon, which already adorned his crown, called the attention of Parliament to the "*divers contrary reports and presidents*," and "*divers crosse and cuffing statutes*," which he recommended them to maturely view and reconcile. He also appointed a royal commission, which, under the presidency of Sir Francis Bacon, made considerable progress in the work of

reforming and recompiling the statute law. To the same object the labours of successive committees of the House of Commons were directed during the Usurpation and after the Restoration, but unfortunately no substantial result followed. And though the matter occupied the attention of the Commissioners of Public Records in 1806, and gave rise to resolutions in both Houses of Parliament in 1816, the well-known constitutional apathy of our legislators to the subject of legal reform prevented the project from going further.

In this country it has always been tacitly admitted that as a preliminary to codification our statute law must be revised and consolidated, just as the issue of *ordonnances* by Louis XIV. and Louis XV. was a prelude to the *Code Civil*. Accordingly, it was on this principle that the recent movement in the direction of codification was started by the appointment in 1854 of a Royal Commission for the purpose of consolidating the statute laws of the realm, with power, if the commissioners thought fit, to incorporate portions of the commerce law into the Consolidation Statutes. From 1855 to 1859 the Commissioners presented four reports, which are valuable as setting forth the difficulties and the possibilities of the undertaking. Their remarks show the unwisdom of those who think the codification of statute law would satisfy the country's requirements. Such a code would be extremely incomplete, and in many parts a mere series of exceptions without the rules. So far from turning out a help to the public, it would be positively misleading. Simple consolidation, again, that is, piecing together in organic order the various enactments of all dates relating to each subject, would yield an unsatisfactory patchwork. The Commissioners rightly thought that consolidation, to be useful, implied recasting and simplifying the language of the older statutes, combined in many cases with actual amendment of the law. Their opinion was that the expurgation and classification of the contents of the statute-book must precede their consolidation, and they reported that under their supervision these preliminary processes had been accomplished in regard to the statutes from 1800 to 1858. They arrived at the general conclusion that the whole existing statute law might be consolidated in from three to four hundred statutes, of which they had prepared upwards of ninety. And they recommended that some barrister of eminence should be appointed, at a high salary, to devote his whole time and attention to the work of statute-consolidation, parcelling out the different bills among competent draftsmen. Finally, they expressed their belief that the whole undertaking might be completed in about two years.

Although the encouraging prospect held out in these reports should have spurred our law reformers to renewed energy, they contented themselves with leisurely submitting bills to Parliament, at intervals, for the repeal of practically obsolete statutes. Some

interest was excited by Lord Chancellor Westbury's speech in introducing the Statute Revision Bill of 1863, when he took occasion to sketch the outline of a comprehensive plan he had formed for digesting the common and statute law of England. The scheme was never more heard of, and the reason is probably to be gathered in the passage of his speech where he said that the law of England would never be in a fit state for codification till the absurd division was got rid of between the province of Common Law and the province of Equity. It required a man of Lord Westbury's nerve to announce this doctrine in a place associated with the labours of so many fathers of English equity, from Lord Nottingham to Lord Eldon. But the words of the Chancellor fell upon stony ground, and it required an education of ten years to make the idea penetrate the heads of English lawyers. They continued to class equity as a source of positive law distinct from common law and statute, and vainly to imagine that justice could be administered apart from equity. Had they only extended their view beyond the narrow bounds of their own system, they would long since have perceived that equity is not distinct from law, whether as regards its origin or its objects. The whole aim of positive law is only to declare equity and reconcile it with utility. "Upon these two legs," says Stair, "doth justice move in giving every man his right." Equity is not an objective law-source, but a subjective guiding principle that helps us to interpret laws from whatever source they spring. It permeates and tempers all branches of jurisprudence, and has no greater claim than logic or grammar to be classified as an objective law-source, distinct from common and statute law.

Meanwhile, certain schemes of codification which were being carried out in America attracted notice on this side of the Atlantic, especially that which was set on foot by the state of New York. The legislature of that state having caused its statutes to be revised in 1830, and its law of civil and criminal procedure to be subsequently codified, appointed a commission in 1857 to frame a code comprising the whole law of the state with the exception of Procedure, and for convenience to subdivide it into three portions, to be called the Political, Civil, and Penal Codes. The commissioners were three in number, to hold office for five years, and to "receive no compensation whatever." They prosecuted their task with diligence, and in 1860 reported the Political Code to the legislature as complete, following it up with the Civil and Penal Codes in 1865. It may be remarked, however, in passing, that these Codes have never been finally sanctioned.

When our Government again took up the question, they turned their attention to the project Lord Westbury, when in office, had been ambitious of inaugurating. In 1867 they appointed a commission to inquire into the expediency of a Digest of Law, and the best means of accomplishing that object, and of otherwise exhibiting

in a compendious and accessible form the law as embodied in Judicial Decisions. It was unfortunate the notion of a digest bulked so largely in the terms of the remit, for a digest, as the commissioners understood the word, could prove no substitute for a code. And the country, after incurring great expense and waiting many years, would after all have found its wants still unsupplied. However, in the first year after their appointment, the commissioners reported that a Digest of Law was in their opinion expedient, and that having heard the evidence of skilled witnesses, and among others, of Mr. Dudley Field, one of the New York Code Commissioners, they had come to the conclusion that specimen digests of different portions of the law should be prepared before Government was committed to the large expenditure that a complete digest would necessitate. But in their second and final report in 1870, the commissioners, after considering the three specimen digests on Bills, Mortgages, and Easements, which in pursuance of their scheme had been prepared and submitted to them by three members of the Bar, stated that they found it unadvisable to continue this mode of proceeding owing to the great expense and labour it would entail on the Commission. But they thought a General Digest should be at once taken in hand under the superintendence of a commission consisting of "the most highly skilled persons whose services can be procured," not exceeding three in number, who should, in return for high remuneration, give to the undertaking the whole of their time and energy.

If these recommendations had been followed, the attainment of a code would have been retarded rather than accelerated. Fortunately they were disregarded, partly owing to the dissent of Justice Willes, appended to the report, and partly no doubt to the clumsiness of the commissioners' scheme. The proposed digest would have been merely a new and more unwieldy edition of Comyns' Digest. It would have numbered from fifty to a hundred volumes, and been of no use to any one but the professional lawyers. It would have embodied the conflicting decisions of the Courts of Common Law and Chancery, and tended to perpetuate that mischievous distinction between the two jurisdictions which has now happily been abolished. The probability having been foreseen that the Digest Commission would end in failure, Lord Chancellor Cairns, with the concurrence of the Lords of the Treasury, appointed a committee, in 1868, to complete the expurgation of the statute-book begun by the Consolidation Commissioners, and to publish a revised edition of the residuum. The gentlemen nominated were Sir J. G. S. Lefevre, Sir T. Erskine May, Sir Henry Thring, Mr. Rickards, Mr. Reilly, and Mr. Arthur John Wood; the last mentioned gentleman to be the editor. Their task had been facilitated by the annual series of statute-law revision acts which for some years past had received the sanction of Parliament, and as



their duty was merely to publish in a compact form the enactments left intact, one might reasonably have expected that the work would be speedily concluded. However, there may be reasons for the delay that are unknown to the non-official world, and perhaps it is ungracious to grumble at a committee who have now published seven octavo volumes, containing the subsisting statutes for the period comprised in thirty-one quarto volumes of Ruffhead's edition. An eighth volume has been promised by the Lord Chancellor shortly; and the ninth volume, completing the series, will be ready, it is expected, early next year. But it must be kept in mind that this revision will only extend to 1868, the year of the committee's appointment, and that probably three additional volumes might be filled with the statutes passed since that date and still in force.

This publication will be extremely useful, if not indispensable, to those employed in the further work of classifying and consolidating the statutes; but its advantage to the public and the profession is now doubtful. One must still hunt through the different volumes for the various enactments bearing on one subject. And though the diminution in bulk will be a benefit to those who can more easily spare money than book-space, young lawyers knowing that a copy of the statutes at large can be picked up for about eight pounds, will not be inclined to lay out ten guineas on the expurgated edition, destined to be superseded at no distant period by consolidation statutes. Both lawyers and *littérateurs* are aware that it is often necessary to consult obsolete statutes with the view of ascertaining the state of the law at a particular date, and, if given their choice, would probably in most cases prefer to have in their library the more comprehensive collection. It may have been necessary that the nation should incur the expense of printing the Revised Statutes for the use of the officials engaged in the work of consolidation. But the public would have reaped greater benefit if, instead of keeping to the old system of chronological order, the commissioners had first of all completed their revision, and then issued a classified edition on a plan similar to that of the Classified Index to the Statutes published in 1870.

It may be mentioned, in passing, that the Legislature, while taking measures to reduce the quantity of our raw material for a code, have also been exerting themselves to ameliorate its quality. Two committees of the House of Commons have recently taken evidence and reported on the best means of improving the manner and language of Acts of Parliament.

Our prospects of one day possessing a British code are thus distinctly brighter than they have been at any previous stage of our history. If, on the one hand, we have no reason to boast of our progress, we have on the other as little cause to be disheartened. The work is necessarily one of time, and before it can approach completion, measures will have to be taken for effecting a greater

assimilation in the laws of the three divisions of the United Kingdom. But our requirements in this respect will best be ascertained in the course of operations, and the need of assimilation is no valid reason for delay.

We do hope the Government will not allow themselves to be influenced by Social Science or other speakers or writers to stop the good work. Now and then, especially in September, the month dedicated in Great Britain to the social meetings of peripatetic scientists, the British public is cautioned that in their country a code of law is impossible, and inadvisable if it were possible. They are warned that it would stop the development of the common law, which, as the gradual growth of centuries, is so well adapted to the national genius. The arguments of Savigny against codification are reproduced *ad nauseam* and recklessly applied to circumstances and times to which they have no relevance whatever. If these reactionists would only devote a little study to the history of the subject, they would see that the state of things which existed in Germany in 1814, when Savigny published his attack on the projected German Code, does not now, and never did, exist in England or Scotland.

It is remarkable how the alliance between law and the sciences has at one period given to the former fresh vitality, while at another it has led to its decadence. The revival of jurisprudence in the twelfth and thirteenth centuries was due not only to the careful collection and promulgation of the correct text of the Roman law, but also to the success attained by the glossators in applying to it the sciences of Grammar, Logic, and Diplomatics. The work, however, was crowned, so far as the knowledge of the period permitted, by the labours of Accursius, and the commentaries of the school of Bartolus and Baldus degenerated into a tissue of logical trivialities and scholastic prolixities. A fresh impulse was communicated by the *renaissance* which stirred up activity in all departments of life, and Cujacius and his rival Donellus once more elevated legal science to distinguished eminence by the help of classical philology and archæology. But the vast labours of these masters left little to be gleaned by their followers, and in the hands of writers like Bynkershoek and Heineccius law made little progress. A new era was inaugurated by the publication of the great work of Grotius, who sought to free jurisprudence from the mediæval chains of clerical dogmatism and ecclesiastical authority, by basing it on principles of philosophy and social morality. Puffendorf nobly seconded the efforts of Grotius to effect the secularization of law, and the public gladly availed themselves of the weapons furnished by the jurists to attack the pretended divine jurisdiction of the Romish hierarchy. But soon the so-called law of nature degenerated into a *Rechtsphilosophie*. Leibnitz laid violent hands on it for the illustration of his system of Pre-established Harmony. Wolff applied to it his all-embracing

Perfection theory. In the works of Kant and his successors, law as a science was cruelly despoiled of its individuality, and got jumbled up with morality, religion, and æsthetics. Kant taught that law differed from morality only in its capability of being enforced by external compulsion, and in his zeal to extend the sphere of compulsion, went far to obliterate the boundary between the two, while Fichte postulated an "ewige Rechtsidee," from which he pretended to deduce the whole science of law. These philosophers lived in an ideal world peopled by human atoms without nationality, without a history, of no race, and belonging to no epoch in particular, featureless specimens of man-as-he-ought-to-be. It was as if scientific chemists set themselves to discover, by the chemical combination of albumen, fibrine, and other nourishing substances, a universal food to which all mankind should be forced to conform, whereas common sense suggests that each people should use such home and foreign products as they can naturally assimilate, and should be allowed to follow the rules of diet prescribed by the reciprocal relations of climate, race, and animal organization.

To counteract this pernicious tendency of deductive philosophy, Germany could not in the early part of this century derive any effectual aid from her jurists. Their learned and cumbrous works were ranged on the side of philosophy and authority. And the wants of the people were only ministered to by the practitioners who, despised by the theorist as ignorant legal journeymen, had no hand in the work of legislation. The old native common law had been overlaid and practically superseded by the civil law which, introduced without any formal legislative sanction, had in course of time come to be accepted as binding on the whole empire. The emperors flattered themselves they were the lineal successors of Augustus and Justinian, and as such entitled to exercise the despotic power of the rulers of the lower empire in the days of its decay. Similarly the civilians claimed a position in the modern empire similar to that occupied at Rome by the classical jurists. They were blind to the changes wrought by history. They supposed that to place them in the same rank as Papinian and Ulpian nothing further was needed than a laborious textual acquaintance with the *corpus juris*. But while the old Roman jurists came from the people, the modern civilians proceeded from the universities. They were learned doctors who addressed themselves to the scientific study of a body of foreign law, not trained lawyers, whose labours tended to develop the *lex scripta* and *non scripta* of home growth. Hence their devotion to theory and neglect of practical experience. They did not, like the hard-headed classical jurists, engage in the every-day practice of the profession, nor, like the school of Bologna, were they appointed to high administrative and diplomatic offices in the service of the state. The emperor sometimes called in their assistance to maintain the independence of the secular power against the encroachments of

the papacy. But this only served to give them a bias on the wrong side. It led them to exalt the position of the emperor in relation not only to the church but to the people. They enlarged the circle of his *jura regalia*, giving him a patrimonial right to mines and minerals, fishings, forests, game, ways and waters, fairs and markets, and attributing to him other extensive powers of interfering with private property in the soil. Penetrated by the true *esprit légiste* they slavishly adopted whatever doctrines were to be found within the four corners of the *corpus juris*, however incongruous to modern idea. Moreover, having gained possession of the law-courts, they absurdly refused to recognize legal principles or remedies that had not been sanctioned by the Romans. The maxim "Quicquid non agnoscit glossa nec agnoscit curia" was rigorously enforced. Rejecting old Teutonic customs they regarded the emperor as the sole fountain of law. "Que veult le Roy, ce veult la Loy" was the modernized form of stating the Imperial claim to be *lex animata*. There arose a bitter antagonism of *Volksrecht* to *Juristenrecht*, a distinction unknown to ancient Rome. The real national needs were unsatisfied. And at court and in the universities it was the generally accepted belief that the most perfect system of law was a code philosophically deduced from a few *a priori* principles worked out by the light of the *corpus juris* and promulgated to the people as a brand new gift from a paternal ruler. It was in these circumstances that Savigny came forward to do for German jurisprudence what Bacon had done for philosophy, to emancipate it from the rule of the philosophers and the civilians, and like Bacon to substitute for the *Anticipatio mentis* the *interpretatio Naturæ*.

At the conclusion of the War of Independence against Napoleon, when the German population woke up from the listless depression of a conquered country, a general cry arose for legal reform. Many people advocated the adoption of the French code, attracted probably not so much by its clearness of expression and arrangement as by the Republican doctrines it embodied. In opposition to this party Thibaut wrote a pamphlet urging that a national code should be drawn up by native jurists and accepted as law by all German-speaking countries. It was in answer to this proposal that Savigny published his celebrated brochure *Vom Beruff unsrer Zeit für Gesetzgebung und Rechtswissenschaft*, by which he may be said to have founded the historical school of German jurisprudence. What he strenuously advocated was an entire change of method. The philosophers based jurisprudence on speculations and hypotheses, he wished to base it on facts. While they desired to make the people conform to the exigencies of an artificially constructed body of law, he contended that the law should adapt itself to the needs and exigencies of the people. Further, he maintained that in the existing miserable state of German law it was no time for framing a new code. It would be drawn up with a total disregard of the

old German common law and the wants of the German people, and would probably turn out a compound of philosophical principles and absolutist doctrines. He recommended that law should be studied in a historical spirit, and argued that it was best to leave their common law to develop itself without statutory assistance, till, by gaining a thorough acquaintance with the history of their constitutional rights and legal institutions, they could adapt their projected code to their nationality, their circumstances, and their epoch. The scales suddenly fell from the eyes of the German public, and from that day the historical school has flourished.

It was not reserved for the nineteenth century to reveal to either England or Scotland the propriety of cultivating law and legislation in a historical spirit. Our system of closely following judicial precedent led us into faults the very opposite of those which Savigny deplored. We were too conservative. We were unwilling to modify the law handed down from our ancestors even when the change of times imperatively called for it. Hence the English system of equity, whose growth was due simply to the refusal of the judges to mould the common law to the spirit of the age. Hence the multitude of legal fictions invented to provide a remedy, while feigning to maintain the harsh letter of the old law. With us positive law, though founded on morality, was never confounded with it. If philosophy sometimes, though rarely, was brought to bear on jurisprudence, the practical was never sacrificed to the theoretical. Where shall we find philosophy, morality, religion, and history better combined to illustrate the science of law, while never encroaching on it, than in Lord Stair's Institutions? There is no work equal to it in the whole range of German legal literature. Yet it is thoroughly practical, and is daily referred to in our Courts of Law. Again, Bentham, when attacking antiquated legal doctrines, that had survived their time, and advocating extensive reforms which have since to a great extent been carried out, never lost sight of the true method of effecting reform by basing it on the inductions of experience. Though he knew nothing of civil law, and drew his ideas entirely from his own resources, his guiding principle was after all nothing but the old Roman one of *utilitas publica*. It would have been well had his disciple Austin laboured in a similar spirit, instead of borrowing from foreign sources and superinducing German ideas on the purely English system of his master.

The history of our legal and political institutions is sufficiently known to our lawyers to render the danger of their proposing a code not adapted to the circumstances of the nation quite imaginary. We are as fit for a code now as we are ever likely to be. The national genius is mirrored with distinctness, both in our common law and in our statutes. These are the work not of a holy Roman emperor, or of a learned Cocceji, but of the three estates of the realm, who are not likely at the present day to sacrifice law at the shrine of either despotism or philosophy. The

rapidity required by our advanced state of civilization will not admit of our leaving legislation to the slow development of the common law. And the complexity of the relations of modern life can ill trust to the vagueness and uncertainty that characterize the doctrines embodied in national customs. Law, society, religion, politics—what are they but human life regarded from different standpoints? Their progress must be uniform, and it is the duty of our rulers to secure this. Parliament is not now as it once was—an institution for guarding the integrity of our ancient laws. Its duty is to effect such alterations in them as are suited to the rapid progress made in all departments of life and industry, and to see that law does not lag behind civilization. In the days when the conflicts between the different orders in the state rendered a written definition of their relative rights a difficult if not a dangerous measure, it was perhaps expedient that their motto should be “*Nolumus leges Angliæ mutari.*” “Liberty” was the watch-word then; now it is “Progress.” And while the spirit of the age loudly cries for a code, there is no fear that codification will stereotype the law and arrest its improvement. Law is not a mechanism but an organism; and so long as it is adapted to its surroundings, and strikes its roots deep into the national soil, it will continue its vigorous and symmetrical development, in obedience to its own natural laws of growth.

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### THE SONG OF THE INTRANT.

“*Vos lucernas juris*  
*Nocturnâ versate manu, versate diurnâ.*”

WITH eyelids heavy and red,  
 Intent on the labour of cram,  
 An Intransigent sat, with dishevelled hair,  
 Preparing for his Exam.—  
 Read—read—read!  
 Morning, noon, and night,  
 And still at his books, without liquor or weed,  
 He sat till early light!

“Read—read—read!  
 While the cabs go rattling past!  
 And read—read—read,  
 Till the gay world’s home at last!  
 It’s oh! to be at the Ball,  
 With its dance, flirtation and ‘cham.,’  
 The cool walk home—the quiet cigar—  
 Confound this horrid Exam.!

"Read—read—read !

Till the brain begins to swim ;

Read—read—read !

Till the eyes are heavy and dim !

Stair, and Erskine, and Hume,

Hume, and Erskine, and Stair,

Till over the volumes I sleepily nod,

And headlong descend from my chair !

"Grind—grind—grind !

My brain I never rest !

And for what ? Perhaps a Petition or two,

With a Jury-trial at best !

The Bar is waxing large—

The Causes are waxing few—

Nought but a briefless life stands out

To my despairing view !

"Read—read—read !

From weary chime to chime,

Read—read—read—

As prisoners work for crime !

Bell, and Menzies, and Ross,

Ross, and Menzies, and Bell,

Till the head grows hot, and the feet grow cold,

And the veins of the temples swell.

"Read—read—read !

In the dull December light,

And read—read—read !

When the weather is warm and bright—

I daren't go down to golf,

Cricket I must forswear,

Basket and rod must be laid on the shelf—

There isn't a day to spare.

"Oh ! but to breathe the breath

Of the cowslip and primrose sweet—

With the sky above my head,

And the grass beneath my feet !

Though for cowslip, and primrose, and grass,

I did not care one straw,

Before in an evil hour I resolved

To begin the study of law.

"Oh ! but for one short hour !

A' respite however short !

A little leisure to walk or ride,

If I haven't the time for sport.

A two hours' ride would freshen me up,  
And yet I must toil on here  
Till my temples throb, and my sight grows dim,  
And my head feels dull and queer !"

With shoulders weary and bent,  
Unflaggingly striving to cram,  
An Intransigent sat with an aching head,  
Preparing for his Exam.—  
Read ! read ! read !  
From eve till early light,  
And still of the hours he took no heed—  
He rested neither to sleep nor feed,  
But sat there day and night !

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### THREE EMINENT AMERICAN LAWYERS.

SUNDRY of our newspapers, in the course of comments on the Beecher-Tilton case, have announced that forensic eloquence is dying out in this country. It is a significant commentary on this opinion that three of the four leading counsel on this trial should have proceeded to deliver three of the finest addresses ever heard at the bar. It reminds one of Dr. Lardner's prediction that the ocean could never be navigated by steam;—almost while the Dr. was speaking the first steamship successfully crossed the Atlantic. Our own opinion of the matter is that forensic ability is much more general than it was a century ago, and that the eloquence business is no longer monopolized by a few shining men. If you fill up the valleys in a hilly country the hills will disappear; so able and eloquent lawyers are not so noticeable as formerly, because the general level of the bar has been raised. However this may be, it must be conceded that the three advocates who have just summed up the great scandal trial, would be remarkable lawyers at any bar. Their conduct of this case makes us proud of our profession, and we more than ever wonder at the capacities of the human mind. The effect of continuous legal training is evidenced here. These three great men have conducted the most important trial of a public nature ever held in this country, the longest of any trial on record to our knowledge, save one, and at the close of a hundred days of evidence, have delivered addresses of five, eight, and ten days respectively—addresses which will form a part of the permanent forensic literature—and we suppose they will keep right on trying causes, just as if nothing extraordinary had happened. They will not even have to go to Europe on account of their throats ! And these addresses are no more wonderful, except in length, than



scores of others which the same advocates have delivered, and which the newspaper-men and the general public never heard of.

As the writer of this has listened to the trial of many cases by two of the three advocates in question, and has a general acquaintance with the powers of the third, it may be interesting to some of our readers to have a professional estimate of their characteristics and capacities, and some comparison of their powers.

We have for many years believed, that as a mere declaimer, Mr. Beach stands, not only at the head of the American bar, but at the head of all American orators. His oratorical style is well-nigh perfection. A presence of rare manly beauty and dignity, a voice of great power and sweetness, a vocabulary singularly affluent and sonorous, an unquenchable enthusiasm, and a masculine nobility and vigour of thought, make him a great master of oratory. In regard to his elocution, Mr. Beach has but a single defect; his gestures are constrained, awkward, and violent. As a forensic rhetorician we think he is too level and that his level is too high. He would gain in effect by having more conversational and familiar passages. The thunder is grand, but we don't want always to hear it. He commands rather than persuades, and men sometimes set their faces against such advocacy. As an advocate Mr. Beach suffers from a lack of two gifts—humour and the power of illustration—very important defects in an advocate. In the former of these qualities he is strikingly inferior to Mr. Evarts and in the latter to Mr. Porter. In his conduct of a case Mr. Beach is remarkably self-possessed, fertile, and courageous, but lacks tact and knowledge of human nature. We think, too, from a pretty intimate knowledge of him, that his culture is by no means so broad as that of either of his antagonists. He is not a man of many books, except law-books. Still, he is not by any means a genius; he is simply a man of the highest order of legal talents. It may be inferred from the foregoing that we do not give him the very highest place as an advocate at *nisi prius*. But before an appellate court, in the discussion of pure questions of law, we regard him as the head of the American bar. There his grand manner, his elevated style, his noble scorn of petty arguments, and his various and profound legal learning, find their proper place. This is a higher sphere than persuading juries, and Mr. Beach should addict himself to it. It is in this walk, and not in the service of such men as Stokes, Barnard, and Tilton, that he will find his permanent and most satisfactory fame.

Singularly enough, in Mr. Porter we find a life-long professional antagonist of Mr. Beach. It is gratifying to know, that like two athletes who have long struggled doubtfully for the mastery, they have the profoundest respect for each other. A more complete contrast to Mr. Beach than Mr. Porter, in every point of view, could not be imagined. In person rather insignificant, and in manner apparently somewhat theatrical, he possesses none or few

of the graces of the orator. But he possesses something which is more effective, namely, the indefinable magnetism which enables some rare men to fascinate their auditors. In our opinion Mr. Porter comes nearer to being a genius than any other man at our bar. If we were called on to point out his most prominent and potent characteristic, we should say it is his dramatic power. His trial of a cause from the start is a consecutive drama. No question and no suggestion but has some connection in his mind with his final argument. We have watched his wondrous power in this respect until we have grown to regard it as something almost magical. It has sometimes seemed to us almost as if he swayed the cause at his own sovereign pleasure. In summing up, his glowing imagination, his exquisite ingenuity, his magnificent generalizations, his manly pathos, his faculty of grouping and contrasting facts, his fertility of illustration, and his vivid and dramatic rhetoric, seize upon the listener and carry him out of himself, and make him the property of the orator. Mr. Beach fills us with admiration of the advocate; Mr. Porter makes us in love with his cause: Mr. Beach lifts us up; Mr. Porter carries us away: when we listen to the one we are afraid we shall yield; when we hear the other we yield without knowing it. A great actress said that when she played *Juliet* to Garrick's *Romeo* she felt that she could not deny him access to the balcony; when she played *Juliet* to Barry's *Romeo*, she felt that she must inevitably descend to him. This expresses the difference between these two orators. The one would raise a mortal to the skies; the other would draw an angel down. Erskine or Choate may have surpassed this advocacy, but we doubt it. Before a jury Mr. Porter is peerless. In the higher plane of professional labour of which we have spoken, he is a shining and original, but not an unrivalled, debater. When however the question is one of mixed law and fact, as in the Parrish will case, it would be difficult to conceive anything more admirable than his presentations. As we have not hesitated to speak of Mr. Beach's deficiencies as an advocate, so we shall allude to what seems to us Mr. Porter's main defect. He always strikes us, on reflection, as an actor. He is just as effective in a bad case as in a good one. The cause lends him no aid; he makes the cause. At the moment we yield, just as the jury does. If he has the last word, the day is his. But we suspect that if he is to be answered by a strong man, his wondrous spell might fade.

We now come to Mr. Evarts, who has a more extended reputation than either of his brethren. With a world-wide celebrity as a lawyer and a statesman, he stands as the representative man of our profession. But Mr. Evarts is not a shining orator, and consequently cannot be compared with Mr. Beach or Mr. Porter as an advocate. In several essentials, however, we think he surpasses both of them. In humour, in adroitness, in judgment, in patience, in self-mastery, and in a knowledge of law in its highest and

broadest sense, he is in our opinion *facile princeps*. As we are not a jurymen, we confess that after quaking at the thunders of Beach, and growing feverish over the drama of Porter, it is refreshing to listen to the calm, clear logic of a man like Evarts. If one considers a case under Beach's presentation it is like looking at an object through a superior magnifying-glass; when Porter presents it, you gaze through a variously-stained glass window of many panes; when Evarts presents it, you see it through a broad clear pane of French plate. We had feared however that Mr. Evarts would not appear to his best advantage in this trial. We had supposed that his proper and exclusive arena was where grave constitutional questions are discussed, as for instance on the impeachment trial of President Johnson. But his conduct of this case has been a surprise to us, as we dare say it has been to every one else. It seems to us that it has been faultless. In every point of view—as an examiner and cross-examiner, in the discussion of points of evidence, and in the summing-up, he has exhibited the most varied and admirable talents of a lawyer. His cross-examination of Theodore Tilton, in our judgment, was an unequalled masterpiece, and his final argument, while it must yield to those of his brethren in brilliancy and declamatory force, must have left a deeper mark on the jury than theirs. Mr. Evarts' rhetoric is far from being a model,—somewhat diffuse and involved; but spite of all seeming disadvantages he has the art to appear less an advocate and more a disinterested judge than either of his compeers.

If we are correct in our analysis of the powers of these three great men, it will be seen that each is *sui generis* and unapproachable in his peculiar sphere. All things are not to all men. These three combined would make the ideal advocate, who would persuade Agrippa himself. If we are ever indicted for anything important, we shall retain Evarts as general manager, Porter to sum up to the jury, and Beach to argue the appeal if we happen to be convicted.  
—*Albany Law Journal*.

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#### LORD KENYON.<sup>1</sup>

If the memory of Lord Kenyon is not done justice to by the British public, it is certainly not through want of biographies. Mr. Townshend has placed him amongst his "Twelve Eminent Judges." Lord Campbell, of course, from the plan of his work, was obliged to give a memoir of him, and now, more than seventy years after his death, a descendant, evidently of opinion that his ancestor's character has been misunderstood, and his merits not duly appreciated, has devoted a whole volume to the subject of his life from the

<sup>1</sup> The Lives of the Chief Justices of England, by Lord Campbell; vol. iii. Lord Kenyon; Murray, 1857. The Life of Lord Kenyon, by the Hon. G. T. Kenyon; Longmans & Co., 1873.

family point of view. "*Audi alteram partem*," as the old judge would have said, and we have now an opportunity of hearing what can be urged in favour as well as against Lord Kenyon's claims to be considered an eminent judge. For it must be confessed that the position taken up by our distinguished countryman Lord Campbell, as the biographer of both Chancellors and Lord-Justices, was that of Devil's advocate. The state of mind at which we arrive after perusing a "life" by him is rather apt to be one of surprise that the subject of it, who is represented as in every respect so inferior, and in many so objectionable a man, should ever have climbed up to such a pinnacle of fame. His life of Kenyon is an excellent specimen of his peculiar style, and calculated to be peculiarly irritating to all who, from ties of relationship or otherwise, believe that the Chief-Justice was a great man. Accordingly, we are not surprised to find Mr. Kenyon in his preface remarking of Campbell that he, "while borrowing largely from Townshend, so exaggerated and distorted his facts that it became impossible to allow a biassed estimate of the character of a great and good man to remain unchallenged;" and that he does not think "posterity will ratify Lord Campbell's condemnation of Lord Kenyon's character." Lord Campbell himself seems to have been conscious of the severe tone of his memoir. He commences it by saying, "On every account I wish to speak of Lord Chief-Justice Kenyon in a spirit of moderation and indulgence. But I am afraid that my estimate of his character and judicial qualifications may call forth against me a charge of prejudice and detraction." And he closes by announcing that to spare the feelings of the second Lord Kenyon he has resolved not to publish the memoir in his lifetime. Yet he wishes to convey the idea that he has been concealing rather than exaggerating maliciously the facts of the case. It is, we suspect however, through this memoir of Lord Campbell that Kenyon will continue to be known. His descendant's work is not of a lively character, and its value consists rather in the contribution which it supplies towards a study of the political history of the time than in any information regarding Kenyon himself. There are general complaints of Campbell's unfairness, but there is very little or nothing in the way of a detailed refutation, and in some respects there is a confirmation, all the stronger because of course unwillingly given. No doubt the pedigree of the family is burnished up a bit and made to look more respectable and becoming a peerage, but this is a matter of purely private concern.

Without accusing Lord Campbell of having misrepresented the career of Kenyon, or having deliberately maligned him, it is impossible not to see in his biography a somewhat malicious disposition to dwell upon and perhaps to exaggerate the weak points in his predecessor's character, and to represent him in an undignified or ridiculous light. He is the raw Welshman, honest and industrious, no doubt, but dull and unambitious, contented to plod

on in obscurity if the fates had permitted, but forced notwithstanding by circumstances up the ladder of fame, taking with him the habits and defects which belong to a humble sphere. His meanness, his ignorance, his petulance are duly paraded, and are more likely to leave an impression upon the reader's mind than the learning and legal acuteness which he is admitted to have possessed. As an apprentice in an attorney's office, it is making out the bill of costs which is his favourite pastime. When he rides the circuit it is upon a Welsh pony "picking up a few half-guineas." To his ridiculous stock of Latin phrases, his old wigs and threadbare velvet smalls, careful attention is drawn. His villa is a "miserable tumble-down farm-house," to which he goes down on Saturdays with a shoulder, and sometimes a leg, of mutton for the Sunday dinner. Even the sacredness of death does not deter this malicious gossip. A mistake in the inscription upon his hatchment is set down to a desire to save his estate from the expense of a *diphthong*. It is positively ungenerous in Campbell, as a Scotchman, to sneer at a Welsh love of pedigrees, and if we mistake not his own early career at the bar closely resembled that of Kenyon. Both certainly owed more to plodding industry than to what are called flashes of genius.

Lloyd Kenyon, second son of Thomas Kenyon, was born at Gredington, his father's estate in Flintshire, on 5th October 1732. He came of a family respectable as regards antiquity, but undistinguished. His father is described by Campbell as a squireen little above the level of the surrounding farmers, and struggling to maintain a large family. Kenyon certainly did not receive that education which is esteemed essential in England for any one aspiring to the learned professions. We are told that he never knew even the Greek characters. After a few years of a grammar-school, he was apprenticed to an attorney in Nantwich. In this line of life he would have in all probability continued, had he not become heir to the family property by the sudden death of his brother. As the future squire or squireen he was entered as a student at the Middle Temple in 1750, and six years later we find him called to the bar. His unquestionable qualifications for the profession were not such as to be easily recognised. He had neither influence nor had he eloquence. As a speaker he indeed never excelled, being clumsy and heavy. His fee-book, which has been preserved, after eight years of professional life exhibits an income of £80. But the five years spent at the desk in Nantwich had not been wasted, and although he may have been unable to do justice to a case before a jury, he was well grounded in the law, and especially in the mysteries of conveyancing. He made himself useful to one or two of his more successful brethren, after a fashion well known at the English bar. He became a devil to Dunning, afterwards Lord Ashburton, then rising into fame. They had been friends when law-students and dining together in the eating-houses of Chancery Lane

at 7½d. a head. Another law student, also destined to become famous, although in a different way—we mean Horne Took,—used, in looking back upon these humble meals, to say, “Dunning and myself were generous, for we gave the girl who waited on us a penny a piece, but Kenyon, who always knew the value of money, rewarded her with a halfpenny, and sometimes with a promise.” This plodding and parsimonious young man at last came to be recognised and appreciated by the attorneys, and his practice increased rapidly. He was much sought after for his opinions, and in one year we find him making over £3000 by chamber-work alone. In 1780 he was appointed Chief-Justice of Chester. He owed this promotion in the profession to Lord Chancellor Thurlow, a man of very different character from himself, but whose warm friendship he was so fortunate as to secure. Having been returned to Parliament for the borough of Hindon, he was made in 1781 Attorney-General to Lord Rockingham’s Administration. Although in after life a Conservative, and in fact the very embodiment of legal Conservatism, he thus began his Parliamentary career as a moderate Whig. After being sometime out of office, he was again appointed Attorney-General in 1783, under Pitt, a post which he gave up in the following year for that of Master of the Rolls, retaining however his seat in the Commons. He now continued to deal out equity and support the Ministry until, in 1788, Lord Mansfield, Chief-Justice, was induced to resign a post for which age and infirmity had rendered him unfit, and Kenyon became his successor. It is said that he was offered the Chancellorship, but refused upon the prudent ground that it was not a life office. Thus did the Nantwich attorney’s apprentice, in spite of his indifferent education, his bad temper, awkward style and mean habits, gain the highest honours of the profession, and administer in succession the equity and common law of England. A peerage followed as a matter of course in the case of one who so highly recommended himself to the reigning powers, and his Lordship lived until 1802. Campbell would have us believe that his death was hastened by a decision in the Court of King’s Bench in which the whole puisnes united against him and boldly differed upon a point of law. It is to be feared that the real cause was a blow given to his affection and hopes by the loss of his beloved eldest son. Kenyon, like our own Monboddo, will be remembered for his eccentricities, with this difference, that unlike his Scottish contemporary he has left no monuments of his learning or genius in the shape of printed works, nor were his the eccentricities of genius. And yet it is obvious that Kenyon must have had merits, and very considerable merits, which raised him to the Bench in spite of all that was against him. He owed much indeed to friendship. First Dunning, and afterwards Thurlow, as we have seen, advanced him. But these friendships he owed in turn mainly to his professional abilities, the aptitude which he showed for the law, and the patience with which he worked for those who were more brilliant, but less

studious and less honest than himself. Kenyon's was a mind which, in all probability, could have only accomplished what it did, by forsaking entirely other intellectual pursuits and giving an undivided attention to the law. Hence his ignorance of other things, and hence unfortunately his narrow-mindedness in the exercise of his profession. Even a lawyer in the highest sense he was not. He had ability and knowledge for the ordinary work which he was called upon to do, but he was not really a learned judge, and when called upon to apply the principles of other sciences involved in the merits of the case which he was trying, he was quite incapable of raising his mind out of the narrow groove in which it travelled, and he accordingly failed.

Campbell has himself to confess that Kenyon was "indeed a man of wonderful quickness of perception, of considerable intellectual nimbleness, of much energy of purpose, and of unwearied industry," and very familiarly acquainted with the municipal law of this land. He also gives him credit for an anxiety to decide impartially. He goes further, and even admits, when speaking of him as Chief-Justice, that "his thorough acquaintance with his craft, his intuitive quickness in seeing all the bearings of the most complicated case, and his faculty of at once availing himself of all his legal resources, gave him a decided advantage over competitors who were elegant scholars and were embellished by scientific acquirements." Lord Eldon, who, when a young man, had enjoyed the friendship of Kenyon, has said of him, that he was the only judge he ever knew who was so constantly right that he could act upon the principle that he was always so. And Lord Erskine wrote to the second Lord Kenyon, "I have never omitted any occasion, in public or private life, to speak of your father as one of the greatest judges, as well as one of the honestest men that ever flourished in this country." These very competent opinions must be borne in mind when we read of the old judge in his shabby clothes, blurring out his bad or unmeaning Latin phrases, and losing his temper at the expense of his judicial dignity. Kenyon was indeed a true lawyer. We find him toiling away at the cases of others when he had none of his own. One friend thus wrote of him:—

"Take Kenyon and put him in trammels of Law,  
And give him a case and set him to draw."

Wilberforce speaks of him as bringing home cases to be answered, as another man would crack walnuts; when sitting *tête-à-tête* with Lady K. after dinner. At the bar he was celebrated for his opinions, which were as remarkable for their terseness and brevity as for their sound and accurate law. Upon one question submitted to him he gave two opinions, the first of which was, "I think this is a very doubtful case;" and the second, "I see no reason to alter my former opinion." It was said that he would have his answer ready by the time the clerk who had handed in the papers in the

case had gone his round of the Temple making similar deliveries. But he had a great deal of forensic work also; his fee-book for one year shows an income of £7000 over and above what was made by opinions. He is described as one who had uniformly read his brief and "prepared to battle with force, if not with elegance, all the points which could arise in the course of the cause." He was not counsel in many famous cases. Curiously enough, however, we find him defending, as senior, Lord George Gordon, who, after the riots had been suppressed, was tried upon the dignified charge of high treason. This was indeed a duty which called for much delicate handling in the performance, and a persuasive tongue. But Kenyon had a junior such as the English bar has seldom known; one who although recently called, was already famous for his remarkable power over juries. Erskine was to supply the eloquence; and if we are to believe Campbell, Kenyon was to act as his foil. Certainly this trial established that the latter, as a counsel, was incapable of making a brilliant speech, for the argument which he addressed to the jury was as dry and heavy as if it had been directed towards a bench of judges incapable of impression. His noble client, it is said, as he listened to the tedious harangue, gave himself up for lost. Erskine's speech, on the contrary, was magnificent, and the result was an acquittal. But assuming that Kenyon was conscious of the contrast (which is doubtful) he never exhibited any jealousy towards his junior. On the contrary—although Erskine was a Liberal—Kenyon is said to have shown a partiality towards him when in after years he was called upon to listen to his arguments.

Kenyon was not eminent in the Courts; he found Parliament a still more unsuitable field for the display of his talents. He never attempted to distinguish himself there, but was contented with doing the necessary work of his office, and occasionally launching out into an angry tirade when any speaker roused his indignation. His aversion to the House of Lords was notorious. George the Third is reported to have said to him, "I hear, my Lord, that you would rather listen to me than to the Peers." But although no orator, the legal adviser of a strong Government must always have opportunities of introducing or giving powerful support to useful legislation. We look in vain for anything of the sort in connection with Kenyon. Recently we sketched the career of another Chief-Justice of England, whose name was associated with every legal reform instituted in his time. He was the originator or at least the promoter of them all. True, Denman lived in a day when the eyes of men were opened to see the many abuses which had grown up. Kenyon had this excuse,—the country did not call for reform. Still, occasionally a remedy or improvement was proposed; on such an occasion his position was that of a narrow obstructionist. We find him strongly opposing the bill to prevent vexatious suits for small tithes, as tending to pull down the fabric of the Church. We find



him clearly of opinion that for the public good imprisonment for debt should continue, as conducing in an essential degree to the increase of commerce and the extension of trade. But his Conservatism was most vigorously displayed in his opposition to Fox's celebrated Libel Bill, which was destined to produce so important a change in the law, and form a shield for the unfortunate victims of Government prosecutions. It certainly was not in the interest of George the Third and his favourite Minister that such a bill should pass. It, as is well known, took from the judges and gave to the jury the decision of the all-important question of whether or not what had been published was a libel. But, in spite of the radical reform which this secured, the bill was nobly supported by the Government of Pitt. In Kenyon's eyes, however, it tended to alter the established law of the realm, and was a dangerous innovation upon the Constitution. It was in the debate upon this bill that Lord Stanhope gave a very amusing illustration (doubtless aiming at Kenyon) of the injustice which might arise from leaving the question of libel to be disposed of by narrow-minded judges. He took the case of an indictment for having made use of the expression "a great bore." A jury, he said, if the question were left to them, would not consider this an imputation upon moral character, because "we who attend in courts of justice know well that a person may be a great bore who is very desirous of discharging his duty, and is only very narrow-minded, dull and tedious." But he went on to describe the judges puzzling their brains over the slang expression, and coming to the conclusion that they read nothing in their books of a *bore* so spelt, but that as Lord Coke has laid down that the spelling of words signifies nothing, they were entitled to consider the libel as declaring the prosecutor to be a *great boar*. But a boar they knew about, their authorities having recognised it as "a beast of chase, of an evil and ungovernable nature, the which it is lawful to follow and to kill." But if the prosecutor had the qualities of a boar he must be unfit for society; and to allege this is libellous. Hence a verdict against the defendant.

This speech, which also contained a more direct attack upon the Chief-Justice, called forth from him one of his clumsy and furious replies, in which he charged the noble Earl with having tried to cover with ridicule all that is held sacred, and went on to conjure the House to let the law remain as it was, with all its guards and fences about it.

The fact that the Libel Bill was introduced by Fox was not likely to weigh in its favour with our Chief-Justice. As Attorney-General, Kenyon had persistently, and in spite of the indifference of his own Government, brought forward a motion which would have had the effect of making Fox liable for the interest on all the balances of public money which had ever been in his father's hands, upon the ground that the public were entitled to the profits

made upon public money. Fox, in the course of the debate, said of Kenyon's theory, "This may be law, but it does not appear to be common sense, and therefore I suspect that it is not law, for the law of England and common sense are seldom at variance." Whether or not Kenyon was, as Campbell says, actuated by an antipathy to the family of Fox, we certainly find him doing his very best to deprive that statesman of his seat in Parliament. In the celebrated election for Westminster of 1784, when the contest lay between Sir Cecil May and Fox, Kenyon, then Master of the Rolls, slept for several nights in a hay-loft over his stables, until he was qualified as a scot-and-lot voter, and then gave a plumper for May. Fox was returned after an election which lasted forty days. In the Parliamentary discussions to which this famous struggle gave rise, Kenyon vigorously supported the legality of a scrutiny allowed by the high-bailiff, and brought down upon himself the scorn of Fox. He was described as a person insensible to the rank which he maintained, whirled about in the vortex of politics, and stored with the intrigues of past times. Fox was ultimately successful, and recovered heavy damages in an action against the bailiff for having granted and continued this scrutiny. Kenyon, as may be imagined, did not increase his popularity by such doings. In the *Rolliad*, published shortly afterwards, and dedicated to him as Master of the Rolls, he was covered with ridicule; the incident of the stables, of course, forming material for much banter.

The appointment of Kenyon to the post of Chief-Justice was not at first a popular one. This is not to be wondered at. People dreaded his bad temper and his narrow views. Ridiculous stories were current about him which suited ill with the dignity of the office. And yet it was as a judge that he appeared to greatest advantage and earned his reputation. His judgments were, as his opinions had formerly been, brief and to the point. He could decide cases very promptly, owing to his general knowledge of law and contempt for special research. His honesty of purpose cannot be doubted; but we suspect he was not free from bias. As a test of this, let us look at his conduct when presiding at the political trials which came before him. We have seen how vigorously he opposed the Libel Bill when being carried through Parliament. He was shortly afterwards called upon to apply its principles as part of the law of the land. This he did for the first time in the trial of the publishers of the *Morning Chronicle* for publishing certain resolutions of a Radical character. Although, since Fox's Act had passed, the judge was only required to direct the jury in point of law, as in other criminal cases, we find Kenyon, with all the fire of a constitutional zealot, telling them that in his opinion the paper in question was "a wicked malicious attempt to vilify the Government," and that he considered it as a gross and seditious libel. Fortunately, the jury thought differently, and the prisoners escaped.

Mr. Kenyon has sought to justify his ancestor's conduct upon this occasion by maintaining that he only did his duty in delivering his opinion upon "the whole matter," as directed by the Act. But what would be thought of a judge who, in a case of murder, gave the very strongest opinion as to the guilt or innocence of the prisoner at the bar? Besides, unfortunately for this view, Mr. Kenyon reports another charge also under the Libel Act, but relating to a very different species of libel. This charge was delivered in the trial of Reeves, a violent Tory, who in his zeal to support despotic measures, had published a pamphlet in which the King was exalted and Lords and Commons disparaged. Out of shame (but we may imagine most unwillingly) the Government found themselves compelled to prosecute this supporter, whose zeal had outrun his discretion. When Kenyon came to charge the jury, he would express no opinion upon the merits of the publication. He had not even read the whole of it. The jury were quite unaided in coming to a decision, which they were rightly reminded was not to be his but their own. They were, however, told that if he was in their position he would examine the pamphlet "with every fair leaning to the side of lenity and comparison." A comparison of these two charges certainly will not tend to exalt Lord Kenyon in the eyes of the unprejudiced reader. Lord Campbell suggests as a reason for Kenyon's moderation in this last case, that his own views of the Constitution agreed very much with those expressed by Mr. Reeves. Whether or not this was so, it is impossible to acquit Kenyon from the charge of inconsistency, and viewed in connection with the circumstances of the two cases, it is an inconsistency peculiarly unfortunate. Kenyon was a very severe judge to others besides the disturbers of the public peace. He was himself a strictly moral man, and he delighted to carry on a crusade against various forms of vice. To use his own expression, he sought to make the law of the land subservient to the laws of religion and morality. Accordingly, in actions for seduction and adultery, his object was not merely to compensate the injured persons, but to punish the immoral offenders. He called a co-respondent in one case, "an abominable hoary degraded creature," to whom no mercy should be shown. Against gaming, the favourite vice of that age, he was equally strong. He desired to have gaming-houses put down, and threatened to send their frequenters to the pillory, even although they were "the first ladies in the land." In the House of Lords sneers were made at the legal monks who thought that they must be virtuous in proportion as they were coarse and ill-mannered, a taunt which Kenyon felt deeply. On one occasion, in charging a jury, he said:—

"But, gentlemen, you will consider how far this is entitled to any weight, coming from a *legal monk*; for a great discovery has been made, that the judges of the land, who are constantly conversant with business, who see much more of actual life on their circuits

and in Westminster Hall than if they were shut up in gaming-houses and brothels, are only *legal monks*."

Although thus harsh and severe, there is no evidence that he was a cruel man. Yet he seems to have been contented with the blood-stained code of criminal law, which in all the horrors of its unreformed state he was called upon to administer. Wilberforce in his diary mentions having dined with him, and that he found him favourable to penitentiary houses, and a less sanguinary penal system. If so, he did nothing towards the reformation of the law. One of the few good things recorded of him by Lord Campbell is to this effect. He had sentenced to death a young woman for stealing to the amount of forty shillings in a dwelling-house. The crime had been committed under extenuating circumstances, and it was her first offence. Prosecutor, witnesses, and jury alike had done their duty reluctantly. The prisoner upon hearing the sentence fainted at the bar. Kenyon called out in great agitation, "I don't mean to hang you! Will nobody tell her I don't mean to hang her?"

He was not very successful when he came to deal with questions of political economy. In those days of corn-laws, famines were not uncommon, and when they came upon the land, a vulgar prejudice was excited against speculators in grain, who were believed to be one cause of the high prices. Of this prejudice Kenyon was fully possessed. The acts against forestalling and regrating had indeed "in an evil hour" been repealed, but he would thank God that the provisions of the common law were not destroyed. He punished forestallers and regraters with imprisonment and heavy fines. The offence of which they were found guilty, he viewed as one of the greatest magnitude. Upon convicting Rusby, a corn merchant, who had bought a quantity of oats and resold them at a profit, he told the jury that they had conferred a lasting obligation upon their country. For once he was popular, and met with the approval of the people, who were too ignorant to discover the true causes of the hardships which they suffered. It is however very true that the views of Lord Kenyon, as is pointed out by his recent biographer, were not at that time singular, even amongst men of intelligence and liberal minds. Only a very few had anticipated the sounder doctrines which have since been accepted. It was just his vigour in suppressing what he conceived to be wrong that brought Kenyon so prominently forward as the opponent of forestalling, for Sydney Smith tells us that he could remember when ten judges out of twelve laid down in their charges that the high price of corn was due to the combinations of farmers and middle men.

Kenyon conducted himself upon the bench in a lordly and imperious manner. He was not disposed to follow humbly in the footsteps of his great predecessors, but would talk of Holt as having descended to quibbles, and of the very loose talking of Mansfield. "The supercilious reception which he gave to the

opinions of the other judges," says Mr. Espinasse, "was not merely that of neglect, it bordered on contempt." On one occasion, when they ventured to differ from him, he listened with impatience to their judgments, and when they had finished, exclaimed, "Good God, what injustice have I hitherto been doing! what injustice have I been doing!" He is said to have had his favourite barristers, chief among whom was his old junior Erskine. He is accused by Campbell of having exhibited a prejudice against attorneys, and of delighting in removing offending members of the class from the roll. He is even said to have broken the heart of a highly respectable gentleman, who was suspended from practising upon a charge wholly without foundation. Lord Thurlow (who could take liberties) is said to have once asked him, "When did solicitors become so very odious as I am told you now represent them? When they gave you briefs you did not treat them as such atrocious ruffians."

The popular stories which have come down to us regarding Lord Kenyon relate chiefly to his ignorance and parsimony. They have of course been carefully collected and preserved by Campbell. Most people have heard that the Emperor Julian was confounded by one Chief-Justice in his charges with the Christian apologist and apostles. His knowledge of Church history may not have been great, but we doubt if he ever said, as Coleridge represents him saying, that the Emperor Julian was so celebrated for the practice of every Christian virtue that he was called Julian the Apostle. Nor, although he did use Latin phrases without much regard to their application, could he have ever told a jury that they might retire to their homes in peace, with the delightful consciousness of having performed their duties well, and say, when lying down to rest, "*Aut Cæsar, aut nullus.*" Even Campbell characterises such tales as exaggerations or pure inventions. But his mixed metaphors were singular. "If an individual," he said on one occasion, "can break down any of those safe-guards which the Constitution has so wisely and so cautiously erected, by poisoning the minds of the jury at a time when they are called upon to decide, he will stab the administration of justice in its most vital parts."

As to his niggardly habits, there is doubtless much exaggeration, but it is impossible to believe that the stories told were quite without foundation. His affectation of poverty formed a subject for banter in the *Rolliad*. It was circulated that he had gone to Court in a second-hand suit bought from a *valet-de-chambre*. His ordinary clothes seem to have been very shabby. Those, however, who are disposed to vindicate him will perhaps substitute, with Mr. Kenyon, "simplicity" for "shabbiness" in speaking of his attire. He is said to have worn the same great-coat for a dozen years. His shoes were covered with patches. "A witness," we are told, "who was under cross-examination before him as to his shoes, which had been stolen, smartly answered the question, 'Were they

at all like these?' with the telling remark, 'No, my Lord; a deal betterer and genteeler.'" Campbell charges him with want of hospitality, but Mr. Kenyon assures us that he was constantly entertaining large parties of his brethren. He certainly died rich—leaving something like a quarter of a million—and extravagance is a vice with which, there seems to be no doubt, he never could be charged.

We trust that we have done no injustice to the subject of this sketch, but we must confess his character is not an attractive one. We readily admit that he was honest and highly respectable, an acute and hard-working lawyer. We can pardon his want of brilliancy, but we are repelled by his intense narrowness. Attorney-General, Master of the Rolls, Lord Chief-Justice of England—in spite of all these high-sounding titles, he was not a great man. For one whose natural defects of character had been strengthened rather than diminished by his education and early training, he performed with credit the duties of his high office. But to be an eminent lawyer something more is needed than that aptitude for and knowledge of the law, which was all that Kenyon can fairly be said to have possessed. W. G. S. M.

### THE IMMUNITY OF DIPLOMATIC AGENTS.<sup>1</sup>

M. BERNET, and several other holders of bonds of the Republic of Honduras, brought an action before the Civil Tribunal of the Seine against M. Herran, M. Pelletier, M. Bischoffsheim, and M. Scheyer, as members of the Commission of the Honduras Loan. The pursuers pleaded that the mandate of these members of the Commission was to look after the employment of the funds destined to the establishment of the inter-oceanic railway in Central America, and that the railway not yet existing after the lapse of seven years from the loan being opened, the Commissioners on whose faith and credit the pursuers had relied were in fault, and ought to be found liable to reimburse the pursuers in the total amount of the price paid for the bonds.

In their defences, M. Herran and M. Pelletier took prejudicial pleas. M. Herran, while admitting that he still retained the *status* of a Frenchman, pleaded his position as Minister-Plenipotentiary of the Republic of Honduras, and he maintained that, by reason of the recognised diplomatic immunities, he was not, in a personal matter, subject to the jurisdiction of the French Courts. As for M. Pelletier, also a Frenchman, and who is Consul-General for Honduras, he denied the competency of the Tribunal of the Seine to deal with the matter, resting his position not upon diplomatic immunities, which do not go so far as to protect consuls, but upon the

<sup>1</sup> Translated from the *Journal du Droit International Privé*.

fact that in the transactions in question he acted only as mandatory, in the name and on the account of the Government of Honduras.

The reply of M. Bernet and the other pursuers was to this effect: the immunity from the jurisdiction of Courts afforded to diplomatists has for its special purpose this—to prevent the minister accredited, say to the French Government, from being drawn away from and out of the jurisdiction of his natural judges, who are foreigners, no action can be brought against him except before a Court of his own country, and so he escapes the application of the article 14 of the *Civil Code*. But when it happens, as it does in the present case, that the Minister-Plenipotentiary is a Frenchman, the doctrine of diplomatic immunity no longer applies:—in this particular situation, the French Courts are the only Courts before which the Minister-Plenipotentiary can be summoned. As to M. Pelletier, he asserts that the operation which has given place to this process in an act of the Government—an act done by him as an agent of the Government, and in the exercise of his proper and ordinary functions. For, let us inquire, *first of all*, what is the nature of the alleged responsibility; and, *secondly*, whether the defender has not done certain personal and individual acts which were completely beyond his public functions; whether the commission of which he was a member is entitled to be held as a sort of official representative of the Government of Honduras, or whether, on the contrary, it was not rather a committee of control, having an essential private character. But all this relates to the merits of the case, and the Court has not arrived at that stage.

The judgment of the Tribunal de la Seine was to the following effect:—As to Pelletier, they held that however freely he might be entitled to exercise the functions of consul, he was nevertheless amenable to the French Courts on account of any personal acts of his; that the claim made against him was founded solely upon a personal fault; that it was therefore as a private person and not as an individual that he was brought into Court; that even supposing his allegation were true that it was in his capacity of consul that he had acted in the transactions in question, that was really a defence upon the merits, and one afterwards to be inquired into. Then, as to Herran, it was held that he had been accredited as Minister-Plenipotentiary of the Republic of Honduras to the French Government; that as the representative of a foreign state he was not within the jurisdiction of the French Courts even in relation to transactions in which he might have been engaged as a private person; that even assuming that he had preserved his status as a Frenchman, this circumstance by no means prevented him from enjoying the diplomatic immunities incident to the office which he held, and that it would be contrary to international law and the independence of nations that the representative of one of them should be subject to the jurisdiction of the Courts of the country where he was representing a sovereign state.

This decision appears to us in all points satisfactory. Of the different questions which the Court had to decide, the only one which was attended with difficulty was this—whether the ordinary diplomatic immunity protected an ambassador or minister of a foreign power, even when the ambassador or minister happened to be a Frenchman. A word or two on this question.

Almost all authors are agreed in according to diplomatic agents the right of declining the jurisdiction of the Courts of justice of the country to which they are accredited, and an unbroken and universal practice has given sanction to this opinion. As the Court of Paris said in the reasons for its judgment of 12th July 1867, "It is a fixed principle of the law of nations that the diplomatic agents of a foreign government are not subject to the jurisdiction of the country to which they are sent" (Sirey, 68, 2, 201). As regards France, the Convention's decree of 13 Ventose, year II., has never been repealed. When the Convention decided that individuals who had claims to make against the representatives of other states should address themselves to the Committee of Public Safety, the Convention did not, as has been asserted, substitute one jurisdiction for another; it only gave the opinion that it was through the medium of diplomacy, and of that alone, that redress could be found for any injury suffered by individuals. In the draft of the Civil Code, there was after Art. 3 a special provision stated in this way, "Foreigners who possess a representative character as ambassadors, ministers, envoys, or whatever other designation they may have, are not subject either in civil or in criminal matters to the jurisdiction of the French Courts." This clause was struck out by the Council of State, but that was simply because, as Portalis has said, the rights of ambassadors is a matter regulated by the law of nations, and a code intended to regulate municipal law need not trouble itself about that subject.

The principle of the immunity of diplomatic agents is really no longer practically a subject of controversy. But it may be interesting to know upon what foundation it rests, and what is its justification. In this matter, the writers on the subject are not at one. Some of them confine themselves to saying that the diplomatic agent is thought to reside always in the territory of the sovereign whom he represents: that is the fiction of *extritoriality*. But this fiction, besides justifying nothing, does not even explain the prohibition of pursuing the diplomatic agent before the French Courts; for as it is explicitly said in article 14 of the Civil Code, a person who does not reside in France may nevertheless be pursued before our Courts. Other authors say, and this is a much more satisfactory explanation, "According to the law of nations princes may send ambassadors to each other, and that being so, it is a natural corollary of the fact that these ambassadors should not be dependent on the sovereigns to whom they are



sent, nor their tribunals. They are the word of the prince who sends them, and this word ought to be entirely free; nothing should be allowed to hamper their action. . . . The same law of nations which obliges nations to receive foreign ministers obliges them also to receive these ministers with all the rights which are necessary to them, and all the privileges which secure the exercise of their functions. It is easy to understand that freedom from the jurisdiction of the Courts should be one of these privileges. It is a matter of importance that the minister should have no judge to fear, and that he should not be distracted from his functions by any quirks of law."

If these are the real reasons which explain and justify the immunity of diplomatic agents, as it is manifest that they apply perfectly to the case where the agent sent to us by a foreign sovereign happens to be a Frenchman, there can be no doubt that, as the Tribunal de la Seine has held, the agent, like other agents of the same kind, may in the interest of his sovereign avail himself of the immunity in question. Vattel has drawn a distinction in this matter. When the minister of a foreign power, says Vattel, is also a subject of the state to which he is accredited, he remains subject to the jurisdiction of the country in all matters which do not appertain directly to his ministerial capacity; whatever may be the inconveniences attendant upon the subjection of an ambassador to the sovereign to whom he is despatched, if the foreign prince is willing to put up with that, and to have a minister on this footing, that is his affair, and he has no reason to complain if his minister should be treated as a subject. That is Vattel's view. But in point of fact there is the greatest difficulty in distinguishing between what belongs, and what does not belong directly to the ministerial capacity of the diplomatic agent. Besides, the distinction suggested by Vattel has not been recognised in practice. Furthermore, this distinction is not in accordance with the reasons, even according to Vattel himself, which have established the doctrine of the exemption of diplomatists.

It was therefore with good reason that the Tribunal de la Seine acted in recognising the immunity of a minister of a foreign power equally when this minister happened to be a Frenchman as when he happened to be a foreigner. No doubt, when he is a Frenchman, his creditors have not the resource of pursuing him before the Courts of the sovereign who has sent him to us. But, first of all, when a private interest and a public interest come into conflict, it is right that the public interest should prevail. And besides, the creditors of this foreign minister may apply to have their claims pressed by the French Government upon the foreign government. Lastly, there is always the final resource of waiting till the moment when the minister will cease to be clothed with his diplomatic character; nothing will then prevent them from pursuing him before the French Courts.

## The Month.

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*Juridical Congresses.*—The Nineteenth Annual Congress of the Social Science Association is to be held at Brighton, from the 6th to the 13th of October next, under the presidency of Lord Aberdare. Mr. Fitzjames Stephen, Q.C., is the President of the Jurisprudence Department, the special questions for discussion in which are as follows:—

*“International Law Section.*—What, if any, are the modifications required in the existing Law of Nations? And how may Municipal Law best be brought into harmony with International obligations?

*“Municipal Law Section.*—1. Is it desirable that a prorogation of Parliament should affect the position of bills and other matters in progress, as it now does? 2. Is the codification of the law of England practicable, and if so, in what form? 3. Is it possible, by the creation of a special tribunal or otherwise, to provide for the more satisfactory trial of claims for bodily injuries?

*“Repression of Crime Section.*—1. Has the Prevention of Crime Act of 1871 proved satisfactory in its operation? 2. What improvements are required in the present treatment of prisoners in county and borough gaols?

“Papers on other subjects than the above, within the scope of the Department, will be read and discussed.”

The fifteenth session of the German Juristentag was held at Nuremberg, from the 26th to the 28th August. The presidential chair of this association has been filled by some of the most distinguished jurists in Germany; among others by Bluntschi and Gneist.

The Conferences of European Jurists for the discussion of points connected with International Law are this year to be held in Holland. The Institute of International Law (founded at Ghent in 1873), and the Association for the Reform and Codification of the Law of Nations (founded at Brussels the same year), will hold their annual meetings, both of them under the patronage of the King of the Netherlands, at the Hague, early in September.

*Justice in Andalusia.*—In a recent review in the *Times* of a work called “Untrodden Spain,” by a Reverend Mr. Black, we find the following amusing anecdote extracted from that work:—“A lawyer in my pueblo was, according to an old and barbarous law, condemned to have his right hand cut off for forgery. He escaped, being a man of property, by paying a bribe of £500 to the judge for the time being; another judge soon succeeded the first, and finding the sentence still recorded, and seeing the man walking about with two hands, he proceeded to order execution. The poor lawyer drew out another £500, and was free, but the sentence still stood recorded. Judge succeeded to judge, and each in his turn accepted the bribe. The lawyer’s whole capital is now gone in bribes, and when the next judge comes next year he will most surely lose the long-fought-for right hand. This story is fact.”

The story may be fact, but its appearance in the columns of the *Times* had the effect of calling forth strong denials of its accuracy by persons who appear to be well acquainted with Spain. It is rather a pity that a good story should be spoiled by people who are so absurdly scrupulous as to prefer accuracy to interest. It is not very difficult to imagine how the story got into the book. Every one knows that travellers have a great inclination to fib, and a great capacity for, and indeed a delight in, being hoaxed. Last year an American newspaper had an article on the Scottish Courts, written by a summer visitor, in which article it was not difficult to trace the effects of remarks which were meant as a joke, and were understood as earnest.

*Litigation in Hindostan.*—The mild Hindoo is by nature extremely litigious, a propensity which the Indian Government has sought to check by imposing a heavy *ad valorem* stamp-duty on plaints. In spite of this, suits are instituted, not only upon the most frivolous, but upon the most extraordinary causes of action. Thus we find in the Indian law reports suits instituted by a member of a Hindoo family against the family barber, the only complaint of the plaintiff being that the barber has declined to operate upon his head. The climax of absurdity was, however, probably not reached until the trial of an action which is reported in a recent number of the *Calcutta Weekly Reporter*. The plaintiff instituted a suit against the defendants in the court of a Moonsiff to recover thirty-three rupees (£3, 6s.) as damages, on the ground that the plaintiff had invited the defendants to an entertainment at the plaintiff's house, which entertainment comprised a feast of some 150 persons, and that the defendants had, after accepting the invitation, failed to attend, whereby the food prepared by the plaintiff for his guests was wasted, and the plaintiff was endamaged. The Moonsiff's judgment is in the following words:—"This suit is brought for the recovery of thirty-three rupees, being the sum expended by plaintiff for making preparations for an entertainment in his house for the defendants. It has been proved by plaintiff's witnesses that defendants accepted the invitation of plaintiff, but did not partake of the feast that was prepared by plaintiff at great expense. From this act of the defendants plaintiff has suffered a loss of thirty rupees expended by him in preparing the articles of food necessary for his guests. This sum he would not have expended had the defendants not accepted his invitation. As by this act of the defendants plaintiff has suffered a loss of thirty rupees as proved by his witnesses, I think he will be entitled to recover this sum from the defendants." The case came on appeal to the High Court of Calcutta, which, it is hardly necessary to say, overruled the decision of the Moonsiff, saying that they failed to find either in the evidence or the judgment any ground whatever for holding the defendants liable for damages, and adding "If persons, by accepting an invitation to their neighbour's house, and afterwards

failing to attend, were to be held liable to recoup the entertainer for the price of the food unconsumed on account of their absence, the risk of accepting invitations would be very serious indeed."—*Solicitors' Journal*.

*The Function of Juries in Civil Cases.*—At the recent Gloucester Assizes, as most people have read, a jury made an earnest but awkward attempt to carry out the true principles of British justice and to bring railway companies to a sense of their responsibility to the public. The case before the jury arose out of the well-known Shipton accident. A lady injured in that accident was conveyed to an hotel in Oxford, and a gentleman who was authorized, or thought that he was authorized, to act for the railway company, gave directions that all needful attendance should be given to her at the hotel. On her recovery, and when the bill became due, the company disclaimed liability, and the hotel-keeper raised an action against the lady herself for the sum of £117. At the trial the jury returned a verdict for the amount claimed against the railway company. The judge explained that this verdict was incompetent, because the railway company was not a party to the suit. The jury again retired, and verdict No. 2 was one in favour of the lady for £100. The judge explained to the jury that they could not give a verdict of that kind, seeing that the lady claimed nothing. They retired a third time, and they returned with a verdict of £17 for the plaintiff. Of course this verdict was perfect nonsense, for if the plaintiff was entitled to anything at all, he was entitled to a great deal more than £17. The jury seem to have gone on the principle of giving the plaintiff the odd £17. The jury were, however, consistent throughout the case in trying to make the railway company liable. The *Times*, in commenting upon this case, refers to the opinion which an intelligent foreigner would form upon our system of jury trials. The intelligent foreigner is a gentleman who travels about a good deal at this time of the year, and it is a wonder that the railway companies do not have a special compartment for that kind of tourists. The intelligent foreigner "sees that all civil controversies, as well as infractions of the criminal law, are entrusted to the determination of jurymen who have no special legal training, and he has good reason to ask what advantage is expected from an arrangement on the face of it so unlikely to be satisfactory."

The *Times* goes on to explain that during the last twenty or thirty years railway companies have gathered up against themselves an enormous mass of indignation in the mind of the English people.

"Not a month hardly has passed since the present generation of Englishmen has grown to manhood without a railway accident in which several families have been left wholly or partially destitute. . . . The companies have consistently disclaimed any liability, and have fought through all the Courts every legal point which has

been raised against them. In a great majority of cases they have evaded the consequences of negligence. But they have not done this with the assent of English jurymen. We are very strongly of opinion that responsibility should be more directly brought home to railway and other companies which deal thus freely with human lives, but we cannot altogether approve the penalties inflicted by juries, and we can understand how foreign critics are astonished at the practical results of applying lay sense in legal controversies."

If "responsibility should (as the *Times* says) be more directly brought home to railway and other companies," why does not the Legislature do so? The state of the law relating to this subject is very unsatisfactory. This department of law has become very complicated and very absurd. The Legislature ought to render it a great deal less absurd, and bring it into accord with common justice and common sense. That has not been done; and the consequence is that juries very often take the law into their own hands, and we do not feel very much disposed to blame them for doing so. No doubt mistakes are sometimes made. That is an incident of all mob law, but mob law is better than no law.

This is just the way we act in England—substantial justice is done, but in a clumsy, blundering, and irregular manner.

*Old Friends with a New Face.*—Some years ago a new book was published in London under the title of "The Heavenly Pilgrimage described under the similitude of a Voyage," or a title as near as possible to this, with a preface by an eminent Congregationalist divine. Some curious inquirer discovered that the book was a reprint of one which had appeared in America under the title of "A Reel in a Bottle; by an Old Salt." The American publishers, if we are to believe our American legal contemporaries, are just as clever in furbishing up old literary wares. The *Central Law Journal*, published at St. Louis, states that a New York firm have recently published Mr. Forsyth the Member for Marylebone's well-known work "Hortensius; or the Duty and Office of an Advocate," under the new title of "History of Lawyers, Ancient and Modern," without any explanation, and that the *Journal* has been threatened with an action of damages for commenting on the fact. The *Albany Law Journal* mentions that the same publishers have published Stephen's "Adventures of an Attorney in Search of Practice," accrediting it to a better known writer, Samuel Warren.

Now there can be no doubt that an author or any other person to whom the right of publishing a book belongs, may change the title of the book. The original title may not be a suitable one, may not properly indicate the nature of the work—may not be such as to attract the attention of the class of persons for whom the work is intended. The title of Bishop Berkeley's "Essay on Tar Water" did not indicate to an ordinary person the metaphysical moonshine to be found in the book; and we are far from thinking that "A Reel in a Bottle; by an Old Salt" was a suitable title for a work of a

religious character. A man is quite entitled to change his own name or the name of his book, but, when the change is made, he should give notice of the fact, so that the public may not be deceived. When, a few years ago, Mr. Josiah Bug changed his name to Norfolk Howard, he exercised very probably a wise discretion; but he was honest enough to advertise the change of appellation, so that everybody was aware that it was the same popular old insect after all. And when some gentlemen of the name of Gammon changed their name to Grenville (they always do get into the peerage when they change their names) they advertised the fact; so that the public knew it was all Gammon after all. In the same way the American publishers, when advertising the book in question, ought to have informed the public that the *History of Lawyers* was the same old *Hortensius* after all; just as Bug and Gammon did; so that no person by mistake should provide himself with a second specimen of the same article, and feel sorry afterwards.

Of course we are not expressing any opinion on the merits of the controversy between the American publishers and the American journal. We have only seen the statement of one side; and we are far from approving of the notion (and we are sure that our legal contemporaries in America are far from approving of it either), that a journalist is as privileged as if he were the wretched little representative of a wretched little half-caste State, and that he is entitled to say things about a publisher which are not correct in point of fact, and to threaten him, if he will not submit to that sort of nonsense, he will hurt the sale of his books.

*The late Court of Chancery.*—The Court of Chancery has ceased to exist. The Scottish idea of refusing to separate Law and Equity has at last, after the debate of centuries, prevailed in England; and, to judge from the reports in the newspapers, nobody appears to have been extremely sorry about the matter. When, at the commencement of the English Long Vacation, the Vice-Chancellors announced the melancholy fact of their Chancery decease, no peculiar emotion was aroused in the legal mind. No tears were shed; no requiems were sung. There is a Poets' Corner in Westminster Abbey. There does not seem to be any Poets' Corner in Westminster Hall. As has been said by the *Spectator* :—

For the world at large, the epitaph of Chancery is brief and unsympathetic. Modern judges do not seem to be impressed with the dignity of the tribunal in which they sit as their predecessors of the last century were, though they are possibly more seriously weightied with the responsibility of doing justice. Before these new ideas, the old reverence for the name above the thing has taken flight, and when the wisdom of jurists and of practical lawyers has determined that the authority of the Court of Chancery should be merged in that of a new tribunal, with a wider scope of action and a more elastic method of working, the cry is all but unanimous, "*Le roi est mort, vive le roi!*" In reality, we ought to say, there is no cry at all. No one makes a fuss about a matter on which everybody who has a mind to make up has long since made up his mind. The inevitable revolution is accepted as if it were a

simple change in a railway time-table, and the Bench, bidding the Bar good-bye for the Vacation, murmurs placidly, "When we meet again there will be no Court of Chancery."

The same journal adverts to the influence which the Court of Chancery has had upon the social life and the private rights of English people:—

The Court of Chancery, in the popular mind, has been identified with certain methods of procedure from which the other tribunals of this country have been debarred. The severity with which the writ of injunction and the decree of specific performance are enforced has produced a vague terror of Chancery proceedings. If a vexatious litigant be forbidden by the Court of Chancery to resort to proceedings at common law, and should be venturesome enough to disobey, he goes to prison; if a dishonest party to a contract declines to carry out his bargain the Court of Chancery will order him to do so, and if recalcitrant, he goes to prison. But these peculiar powers which have impressed the authority of Chancery on the popular imagination will not come to an end because the name of the court is changed. The High Court will have all the authority that any English tribunal, in constitutional times, has ever enjoyed. Yet so much is in a name, that we shall not be surprised if the new court has to put forth its strength vigorously, not once, but many times, before the mass of Englishmen will be convinced that any other institution can wield the same powers as the Court of Chancery—which, as they have this week been told, will never sit again.

We extract from the *Times* the following interesting account of the history of the Court which no longer exists:—

This great Court has been for ages known so entirely as a Court of Equity that it is difficult to realise that it was originally a Court of Law—that it was the source of the Common Law, and the origin of the Courts of Common Law. Yet it was originally the fountain of justice, the *officina justitiæ*; and justice in ancient times was deemed to include Equity as well as Law, or rather Equity, as Bracton said, was regarded as a quality of Law. Hence the original writs which gave the Courts of Common Law jurisdiction in civil actions issued out of Chancery. As Chief Baron Gilbert said, The Chancellor, when there was as yet but one great Court (as now, after the lapse of ages, there is to be again) held the seal, and after the division into several Courts, he retained it, and so the original writs which gave them jurisdiction were sealed by him and issued from the Chancery. Thus the Court of Chancery was originally the source and fountain of the Common Law; and for ages—when men's relations, transactions, and affairs were simple in their nature—the writs and remedies provided by that Court for the Courts of Common Law were sufficient; and equity was infused into them as incident to justice. It was only in after ages, when the nature of men's relations and transactions altered and were no longer provided for by these simple remedies, that equitable jurisdiction was exercised by the Court of Chancery. The jurisdiction of the Court was at first exercised in the same classes of cases as now come within the jurisdiction of the Courts of Common Law. This was illustrated long ago in the learned works of Spence, of Seton, and of Palgrave, and it did not escape the acute perception of Macintosh. When the Courts of Common Law were established the suitors were sent there for redress, and then, upon the other hand, they afforded redress in all cases that arose, some of which at a later age were sent into the Court of Chancery. This is manifest from ancient records which have been preserved, and some of which are mentioned by Lord Hale. There are records of bills in the King's Bench for what would now be called suits in equity, as by mortgagors for "redemption;" and in the reign of Edward IV. the Common Law Judges avowed that if it had not been for ignorance of law the King's Bench could have exercised equitable jurisdiction, and could have granted an

injunction. As, however, the jurisdiction of the Courts of Common Law became exercised under fixed forms of remedies, many which they did not include, or which afterwards arose, were sent into the Court of Chancery for relief, and hence the "equitable" jurisdiction of that Court, as it was called, in order to distinguish it from that of Courts of Common Law, though it was in truth quite as much a legal jurisdiction as the Common Law. This is the account given by Sir John Strange, a great master of Law and Equity in the last century, and it is verified by the records and documents of legal history. From the very first exercise of this equitable jurisdiction, it was rigidly kept by Statutes and by Royal ordinances in harmony with the Common Law. It was again and again declared by Parliament that the Court of Chancery should not exercise jurisdiction in any matter determinable at Common Law, and this cardinal rule has only thus far been relaxed that the Court would entertain jurisdiction in cases in which, though determinable at Common Law, in the sense of being within the jurisdiction of Courts of Law, those Courts could not from the defect of their procedure or remedies afford adequate redress. Thus it was that the Court came to exercise jurisdiction in cases determinable at Common Law, in order to afford discovery or other assistance not then obtainable in a Court of Law on an injunction. Very early it was settled that the Court of Chancery should not exercise jurisdiction in cases cognizable in a Court of Common Law, unless some relief was required which the Court of Chancery alone at that time could give—as a discovery or cancellation of a deed. In an action at Common Law a party could not have discovery of evidence of his case in his adversary's knowledge and possession, and it was of the essence of Chancery jurisdiction to give it; and so a Court of Common Law could only decide that a deed could not be sued upon and could not, as the Court of Chancery could, direct it to be cancelled. Even in cases in which there was no remedy at all in Courts of Common Law, as cases of special trusts—such as required the management of property and the like—the Court of Chancery never proceeded contrary to Common Law, and its jurisdiction was supplemental, not contradictory to that of the Courts of Common Law, and was quite in harmony with it. All this was fully explained at the time when the nature of Law and "Equity" came first to be discussed, in consequence of the use of those terms having arisen in order to describe and distinguish the law administered in the Court of Chancery and in the Courts of Common Law. In the time of Sir Thomas More, when the equitable jurisdiction of the Court was rising, it was carefully and clearly pointed out that Law is not different from Equity, though now and then a rule of Courts of Common Law might not be enforced in the Court of Chancery. Thus it was a stupid rule of the Courts of Common Law, arising from a mere blunder of the Common Law Judicature, that payment of a bond debt could not be proved unless by an acquittance under seal. This was not, however, it was said, the Law; it was simply a rule of the Courts of Common Law as to proof; and so the party went into the Court of Chancery for relief, and the relief was called "Equity;" but it was simply good law. The Common Law Judges had misunderstood the law, and the law was set right in the Court of Chancery. This was shown by the result; for the Common Law Judges in a later age dropped their stupid rule, and so Equity and Law upon the subject were acknowledged to be the same; and Finch used to taunt the Common Law Judges with their former ignorance, in holding anything so absurd to be law. So in every instance in which it was supposed that Law and Equity differed. But the general rule was that when there was a remedy in a Court of Common Law, there was none in the Court of Chancery. In the reign of Elizabeth it was resolved by all the Judges, on a reference to them by the Queen, that whether lands were parcel of a manor or not ought to be tried at Common Law and not in Chancery; and the same doctrine was adhered to in all subsequent times, that a party who had a remedy—that is an adequate remedy, at Common Law—i.e., in a Court of Common Law—could not have recourse to Equity or have a remedy in Chancery. It was well understood and agreed by Lord Bacon himself that a



matter properly determinable by a Court of Common Law ought to be determined there and not in the Court of Chancery; and so, when the question was whether a conveyance had been revoked or not, Lord Bacon and the Master of the Rolls and Chief Justice Hobart agreed that the cause was not fit for Chancery, but for the Common Law, unless it was said, "all causes that were triable naturally at the Common Law and by jury should be made examinable and determinable in Chancery, which were to confound jurisdictions and make the Common Law and the course thereof useless." In the reigns of James I. and Charles I. it was repeatedly agreed by the Chancellor and Common Law Judges sitting with him that the Court of Chancery should not relieve a man against a rule or maxim of the Common Law to contradict it or conflict with it; for this, it was said, would be to make a new law, and it was necessary therefore, in order to raise a case for Equity, to show some new matters of fact other than those which the Court of Common Law would have before it, for on a different state of facts the rule would not be contradicted. And this was not left merely to the Chancellor's choice. It was made incumbent upon him by an imperative Royal ordinance. In the reign of Edward IV., at the time the Equitable Jurisdiction was growing, the practice of Common Law Judges sitting with the Chancellor having already arisen, a Royal ordinance made it incumbent upon the Chancellor to consult them whenever any question arose as to whether Equity would interfere with the Common Law; and this practice was always adhered to. On the other hand, the Chancellor was acknowledged as the head of the Common Law Judicature, and as such sat in any Court of Law. Thus, in the reign of Edward III. a Chief Justice being made Chancellor used to sit in the Court of Common Pleas. It could hardly be otherwise, because for ages, and until the Equitable Jurisdiction was firmly fixed, the Judicature of the Court of Chancery was chiefly a Common Law Judicature. It is true that for ages the Chancellors were ecclesiastics, but for that very reason, and because, being addicted to the civil law, they might lean to it too much, and infringe upon the Common Law, the Chancellor was, from the earliest exercise of the Equitable Jurisdiction, assisted and consulted by Common Law Judges. It was stated in a paper drawn up by the Crown counsel in the reign of James I., "We find that there hath been a strong current of proceeding in Chancery in cases where there was no remedy at the Common Law in the times of the several Chancellors, whereof divers were great and learned men in the law. We find that the Judges themselves within our Courts, when there appeared unto them matter of equity, because they could not stay the judgment, have directed the parties to seek relief in Chancery. And we find that it hath been done by the Judges themselves while they sat in Chancery, "in the vacancy or absence of the Chancellor"—as they constantly did by commission.

Down to the time of the great controversy between Coke and Ellesmere as to the jurisdiction of the Chancery, the Chancellor had been regarded as the Chief Judge of the Common Law. In the reign of Edward III., when a Chief Justice was made Chancellor, it appears from the Year-books—and Lord Coke calls attention to it—that he used to sit in the Court of Common Pleas and take part in the discussion and determination of the cases there; and from that time to the reign of Elizabeth, and throughout her reign, the same practice continued. Egerton, while Chancellor, again and again sat in Courts of Common Law, and took part in the discussion of cases there, or called the Judges into the Exchequer Chamber to consider and determine questions of Common Law. In the memorial presented to the Crown in the reign of James I. by the most eminent lawyers, it was stated:—"It cannot be denied but that the Lord Chancellor is above all Judges of the laws, both here, in France, and elsewhere. The Lord Mayor of London is presented to him as to the Chief Justice of England. He giveth the oath to all the Judges. He admitteth all the judges into all their places, and sitteth above them in their own Courts, and calleth the Chief Justices themselves to assist him in Chancery,

and Coventry did the Lord Chief Justice Bramston, where he had no voice,

but was an assistant only. And when all the Judges are assembled in the Exchequer Chamber the Lord Chancellor sitteth above them and delivereth his opinion as Lord Ellesmere did. And if the Chancellor did not grant out writs, the Courts of Common Pleas and King's Bench would have nothing to do, from which it will follow that the Chancery is the most ancient Court, for all the writs were framed and sealed in the Chancery, and without such writs the other Courts could not proceed."

The jealousy between Coke and Ellesmere—representing the Common Law Judicature and the Chancery—led to the great controversy as to the supremacy of the Chancellor; and that unfortunate controversy did infinite mischief in implanting the seeds of a spirit of estrangement between the jurisdictions; and hence the practice of the Chancellor sitting in Courts of Common Law died out, though the Common Law Judges to our own time continued to sit in Chancery. In the great contest between the Common Law Judicature and the Court of Chancery, under Lord Coke and Lord Ellesmere, the conflict was not between Law and Equity, but only as to the administration of Equity. It was only a contest between the Common Law Judges and the Chancellor as to who should administer it, and whether it should be administered in Courts of Law or in the Chancery. There was no dispute as to the Equity, but Lord Coke objected to its being allowed by the Chancellor after judgment in the Court of Law, and apparently in opposition to it. It ought, he said, to be applied and administered, if at all, before judgment, and in the course of the suit at law—that is, Lord Coke was not against Equity, as it is often ignorantly supposed by those who have not studied his works, which are full of equity. No one was fonder of declaring that the Common Law was equitable, but he was for administration in Courts of Common Law; in other words, he was for the concurrent administration of Common Law and Equity, regarding them both as parts of Law. That this was so understood is shown by the tenor of the celebrated paper drawn up against his views by Bacon, in which it is urged that Equity had always been administered in Chancery; "that it was a question, not of the thing, but who shall be the Judges of it, and that it was fittest to go as it was wont, and not now to be transferred to a new Judicature." Both parties strove to show that Equity was quite in harmony with Law, Bacon urging that it had been administered by the Judges themselves, sitting under commission in Chancery, while Coke urged that for that very reason it ought to be administered in the Courts of Common Law; and in the result Coke turned out to be so far right that the Court of Chancery held that a party who had an equity ought not to lie by until an action at law was determined and then come to a Court of Equity, but should come at once, in order to prevent the mischief of double litigation; and, on the other hand, in the Court of Chancery a party was not allowed to sue both there and in a Court of Common Law to the same thing, but was forced to elect where he would proceed for it; and these principles were laid down by Bacon himself when he came to be Chancellor, were embodied in his Orders, and came to be settled principles of Equity, so that this great controversy established the identity of Law and Equity, and showed that it was simply a question of the administration of Equity—in other words, a question of judicature. During the whole of the last century and the earlier part of the present, Common Law Judges sat with the Chancellor to assist him in the determinations of questions of Equity, because they were also questions of Law. Thus Lord Mansfield sat with Lord Keeper Henly to hear a great case in Equity, turning on the nature of trust-estates, and, curiously enough, Lord Mansfield was for carrying Equity further than Lord Keeper Henly, who had to put a restraint upon his Common Law coadjutor by enforcing the great equitable principle that "Equity follows Law." Lord Mansfield was wont to say that he never liked law so well as when it was like Equity. Lord Chief-Justice De Grey used to say that he never liked Equity so much as when it was like Law. Lord Eldon, a great master of Equity and Law, approved both sayings—Law and Equity being, in truth, the same. In the great case of the Earl of Chesterfield, in which the equitable jurisdiction was exercised in its

most stringent form in setting aside an improvident contract by an heir, Lord Hardwicke, then Chancellor, sat to hear it, assisted by two Common Law Judges, and they quite concurred in pressing upon him the exercise of his equitable jurisdiction, although, curiously enough, the Master of the Rolls, who also heard the case, thought there was no Equity as there was no fraud. In another case, which settled the application of a great doctrine of Equity, Lord Hardwicke sat, assisted by three of the Common Law Judges. Innumerable instances might be cited showing that some most important cases of Equity have been determined, down to our own times, with the assistance of the Common Law Judges. Vice-Chancellor Kindersley, for instance, had the assistance of Mr. Justice Cresswell in deciding the important question of the validity of marriage with a deceased wife's sister contracted by British subjects in a country where such marriages are lawful. The practice of Common Law Judges sitting in Courts of Equity continued, in fact, down to our own time, and not many years ago the practice was expressly recognized and sanctioned by the Legislature in the Act constituting the Law of Appeal in Chancery. It is manifest that a jurisdiction which thus, from its very origin, was exercised with the concurrence and assistance of the Common Law Judicature, could hardly be ever in conflict with Common Law; and to this it may be added that several of our most eminent Chancellors, as Hardwicke and Eldon, have been Common Law Judges.

Common Law and Equity both proceeded from the same source, and could never be really in conflict. If they ever differed, or appeared to differ, it was in their application and mode of administration—in their application to different states of facts, or in the administration for different objects. Given the same question and the same state of facts, and the Law and Equity are identical, for the law upon the same subject is and ever must be the same. It would be absurd, said Lord Chief-Justice De Grey, to have one law prevail in the King's Bench and the Common Pleas and another in the Exchequer with regard to the same question. The law on revenue cases would be different from the law as to Crown cases criminal in their character, and either would be different from the law as to private disputes between subjects, but all would be consistent, and the law on each of these subjects would be the same in any Court.

It has been said that there are rights not recognized in Courts of Law which are only recognized in Courts of Equity. But it would be more correct to say that there are rights enforced in Courts of Equity which are recognized but not enforced in Courts of Law. There are no rights enforced in Courts of Equity which are not recognized in Courts of Law. If it was ever otherwise, it has long ceased to be so. More than a century has elapsed since Mr. Justice Buller, an eminent Common Law Judge, pointed out that trusts were not only recognized, but protected at Common Law, though their administration was only enforced in Courts of Equity, and that the very reason why a Court of Common Law did not allow a *cestui que trust* to recover the estate was lest it should defeat the very object of the trust. More than a century has elapsed since the same eminent Judge pointed out that the old Common Law rule against assignment of *chooses* in action was virtually obsolete, because a Court of Law allowed the assignee to recover in the name of the assignor, and, indeed, the law never was against the assignment, though it required that the assignee should sue in the name of the assignor in order to secure justice as between the original parties, and this is the doctrine of equity also, so that here again law and equity are identical. More than a century and a half has elapsed since a Court of Law recognized assignments of debts, and equity of redemption, and other equitable rights as good legal value or consideration for a contract; so that it was clear that the law recognized equitable rights, even where it failed to provide remedies for them; and the distinction between legal and equitable jurisdiction was only one of procedure or of judicature. This was sometimes supposed to indicate a conflict between Law and Equity, but this was an incorrect and erroneous notion. It would be more correct to say that it was to prevent such a conflict; but in truth there was no question of jurisdiction at all, as the action at Com-

more Law was not interfered with, nor was the judgment in such an action ever questioned in a Court of Equity, which always assumed it to be good. All that the Court of Chancery did was to restrain the party from suing execution on a judgment which, though perfectly good so far as it went, was only a part of the justice of the case, and would, if executed by itself, interfere with the full justice of the case. Undoubtedly for ages there was a separate administration of Law and Equity, and Lord Bacon was in favour of it, for he said otherwise "arbitration will supersede law." But it is clear he was thinking of absolute legal rights, such as property, and not of such as are merely pecuniary and may be modified and adjusted in amount; and, on the other hand, Lord Somers, it is clear, agreed with him, except as to such pecuniary demands in which the equity could be administered by adjustment of amount, for he, in his statutes, established only to that extent the principle of concurrent administration of Equity and Law, in actions on bonds, with penalties, by ascertaining the amount really due, a principle not long afterwards extended to mortgages. Beyond that, however, no one until quite lately believed it to be possible to carry the concurrent administration of Law and Equity. Lord Hardwicke was against it, and engaged in a celebrated controversy with Lord Kaimes upon the subject, in which the great Chancellor maintained the principle of separate administration of Law and Equity, or rather of administration of the law as to different subjects in different Courts; for Law and Equity were only the same law applied to different classes of cases, and administered in different ways. The separation of the jurisdictions had, however, this unfortunate effect—that it led to the idea that there was a distinction between Law and Equity, as if they were different kinds of law. This was perceived and pointed out a century ago by Blackstone, who wrote thus clearly on the subject, describing Equity, as Bracton had described it centuries before, as simply an element or quality in law:—

"Equity, in its true and genuine meaning, is the soul and spirit of law; positive law is construed and rational law is made by it. In this equity is synonymous with justice; is that to the true sense and interpretation of the rule. But the very terms of a Court of Equity and a Court of Law as contrasted with each other are apt to confound and mislead us, as if the one judged without equity, the other was not bound by law, whereas every definition or illustration to be met with which draws a line between the two jurisdictions by setting Law and Equity in opposition to each other will be found either totally erroneous or erroneous to a certain degree" (Com. vol. iii. 429).

The great commentator then proceeds to point out the fallacy of all the usual and favourable definitions of Equity, as that it abates the rigour of law, which it has no power whatever to do, that the peculiar subjects of Equity are fraud, accident, and trust, which, as Blackstone says very truly, are often also subjects of Common Law jurisdiction, and so of all definitions which assume a difference in Law and Equity as to their nature. The rules of property and of interpretation are, Blackstone says, or should be, the same as Courts of Law and Equity. He goes on to mention the maxim that "Equity follows Law" in all matters where they have a concurrent administration—that is, in nearly all matters, except matters of trust. In what, then, does the difference, he asks, consist? It consists, he says, in the different modes of administering justice; in the mode of proof, the mode of trial, and the mode of relief. Hence, he says, Law and Equity are founded on the same principles, and according to him the difference was not at all in their own nature, but merely in the mode of procedure and the nature of the remedy afforded. So a great master of Equity, Lord Redesdale, writing at the end of the last century, gives the same account of it, and says that "the administration of justice by the ordinary Courts being incomplete, to supply the defect the Courts of Equity have exerted their jurisdiction, assuming the power of enforcing the principles on which the ordinary Courts also decide, when the powers of those Courts or their modes of proceeding are insufficient for the purpose;" added to which, he says, they assist the ends of justice in various ways by removing the impediments to justice in other

Courts, as by discovery or by protecting or preserving property by means of injunction, &c. This last is the auxiliary jurisdiction of Equity, and has been to a great extent superseded by the provision in Common Law Procedure Acts, giving Courts of Law power to compel discovery or issue injunctions; while, on the other hand, Lord Cairns' Act gave Courts of Equity power to try issues and assess damages with juries. And, as regards the other, or the principal jurisdiction of Equity, it is, it will be seen, identical in principle with law, and is, in truth, law administered in a different manner, applied to different subject matter. In the time of Lord Mansfield the Courts of Law attempted a concurrent administration of Law and Equity, but when they attempted to carry it further than the mere adjustment of money demands, and to apply it to rights of property, they failed. Speaking of these attempts, Lord Redesdale acknowledged the "liberality with which Courts of Common Law have noticed and adopted principles of decision adopted in Courts of Equity, a liberality generally conducive to the ends of justice; but which may lead to great inconvenience if the whole system of the administration of justice by Courts of Equity, the extent of their powers and means of proceeding, the subservience of their principles of decision to the principles of the Common Law, and the defects in the powers of the Courts of Common Law, arising from their mode of procedure, should not be fully considered in all their consequences." And this was the view taken by Kenyon and Tenterden, and all our great Common Law Judges. The great feature in the Chancery system of procedure, and that of which the greatest jealousy was felt on account of its efficacy in extorting the truth, was that it proceeded "by examination and oath of the parties," which parties who were in the wrong very much objected to, as it forced them to disclose the truth; whereas at Common Law their opponents would be put to prove it, which they might be unable to do. Lord Eldon declared this power of forcing the party sued to answer on oath was of the essence of Chancery procedure, since it went directly to the conscience of the party and compelled him to disclose the truth of the matter, and this, in many cases, dispensed with further evidence or trial; whence it was that proceeding in Chancery, until the numerical strength of the Judicature became inadequate, was so much more speedy because it was much more direct, since it forced the party at once to admit the truth, and often enabled the Court at once to decide the case. In ancient times, when the Judicature of the Court, composed of the Chancellor and twelve Masters, each with three clerks, was sufficient, the system was still more effective, for the examinations of the parties were taken orally on oath. In the course of ages, however, the Judicature of the Court not being augmented as business increased, this became impossible, and the answers were taken in writing, though the evidence was taken still orally, before examiners. A simple natural procedure required an ample judicature, and the judicature of the Court of Chancery soon became entirely inadequate.

This is the key to its history and the explanation of its evil character for delay. From a Court, as Lord Keeper North said, with little business and an ample judicial staff, it came, even as early as the 17th century, to engross all the business of the nation, and yet its judicature remained the same. The most remarkable fact in our judicial history is the erroneous and progressive increase of the business in Chancery, coupled with the absence of any adequate increase of the judicature. In the time of Sir Thomas More the average number of suits in the year was 160. In the time of Lord Bacon it was nearly 1500, being an increase of nearly tenfold in the course of a century. In the time of Lord Nottingham the average number was 1650; in the time of Lord Hardwicke it was 2000; in the time of Lord Eldon it was above 3000—that is, more than double what it was in the time of Lord Bacon (indeed, more than fourfold, because there was a vast deal of other business), but the strength of the Judicature remained the same. The great feature of the Court of Chancery as regarded its judicature was its assistant judicature—the Masters. Most of the peculiar business was administrative, and required such an assistant judicature to deal with it, and from very early times there were, therefore, twelve

Masters attached to the Court, each of whom were allowed three clerks, a chief-clerk and two others, the chief-clerk being qualified to act as the Master's deputy, so that there were forty-eight Assistant Judges and judicial officers. By degrees, as the Equity business of the Court increased, these Masters acted as Assistant Judges, and used to sit with the Chancellor or with Common Law Judges when they sat under Commissioners in Chancery. Down to the time of Lord Thurlow, and even later, they so sat and took part in the discussion of cases. Indeed, they appear to have continued to sit in court down to the time of Lord Brougham, for on his accession to office as Chancellor he dispensed with their attendance. The Master of the Rolls was the principal of them, and he used generally to sit with the Chancellor to assist him in hearing important cases, and down to the middle of the last century he only sat in that way, and not separately. In the middle of the last century, in the time of Hardwicke, in consequence of the increased business of the Court of Chancery, the Master of the Rolls, who had been accustomed to sit only with the Chancellor, began to sit separately to hear cases. A great controversy arose as to his power to do so, and Hardwicke himself, then at the Bar, took one side of the controversy, the other side being taken by no less a person than Warburton. It was determined in favour of the power of the Master of the Rolls, and ever since then he has sat separately as a Judge, except in special cases, when he sat to assist the Chancellor. During all this period complaints were loud and bitter of delays in Chancery, and yet it never occurred to any one apparently to reflect that the delay was unavoidable, seeing that the strength of the Judicature was entirely inadequate to the work. And not only so, but even when that was strongly urged by the greatest of Chancellors, Lord Eldon, it was not believed, and the addition of a single Judge to the overworked and overburdened Court was strenuously resisted by Romilly and Brougham. Nor was it effected until the evil of delay had risen to such a height as actually to drive suitors from the Court. For in spite of the vast increase of the property and business of the nation at the opening of the present century, the business of the Court of Chancery actually declined, and the average number of suits was less than it was in the previous century. So that delay arising from an inadequate strength of judicature amounted to a denial of justice. When a single Judge was added to the Court, in 1813, the business began rapidly to increase until, in the course of twenty years, it was double what it had been before. Lord Langdale—a man of singular integrity of mind, clearness of perception, and soundness of judgment—pointed out that the cause of all the evils in Chancery was the deficiency of judicial power. Whatever other evils, he said, there might be, and whatever other improvements might be required, nothing would go to the root of the evil except an increase of judicial strength. Nevertheless, it was not until 1840 that two more Vice-Chancellorships were created, and then, as the equitable jurisdiction of the Court of Exchequer was abolished, there was in reality only an addition of one Judge to the Equity Judicature. This was quite inadequate, and the same evils of delay ensued, and after the lapse of ten years again attracted the attention of Parliament. Debates arose in the House of Commons on the subject, in which Sir R. Bethell, with his usual clearness, pointed out the cause of the evil, as Lord Langdale had done twenty years before, and showed that it arose simply from an utter inadequacy of judicial power. At that time ten years had elapsed since the two new Vice-Chancellorships had been created (the equitable jurisdiction of the Court of Exchequer being, as we have mentioned, at the same time abolished, so that it was only the addition of a single Judge), and, no additional Masters having been appointed, the old complaints about the delays of the Court of Chancery were renewed. In vain, however, Sir R. Bethell showed in the most convincing way that the evil of delay arose from the inadequacy of strength in the Judicature and judicial staff of the Court. In vain he showed that the addition of three Judges to the Court, without the addition of any Masters, had enormously increased the pressure upon the Masters, because the business thrown upon them was proportionately augmented, and thus the cause of delay was necessarily increased. There was a cry for the abolition of the Masters—

that is, the abolition of the whole of the assistant judicature and judicial staff of the Court. Ten working Masters, each with his chief-clerk and two others—altogether forty experienced assistant Judges and judicial officers—were abolished. The reason assigned for it was that personal attention to the business given by the principal Judges would be more efficient; and so it would have been if there had been the Judges required to give the necessary amount of personal attention. Under the new system references in questions involving complicated inquiries were made to the Judge at Chambers; but, as the Judicature Commissioners stated, “are practically conducted before the Chief-Clerk,” and though “any party is entitled to require that any question arising in the course of the cause should be submitted to the Judge for decision, in such a case the Judge hears the matter after he has been sitting in Court all day hearing cases.” It is not surprising to find that the result, as stated by the Judicature Commissioners in their Report of 1869, is “that the system does not give satisfaction; and that there is not sufficient judicial power to dispose of the business in Court, and at the same time to give that personal attention to the business in Chambers which was contemplated when references to the Judge in Chambers were substituted for the old references to the Masters in Chancery.” The Judicature Commissioners did not in terms recommend any addition to the Chancery Judicature, but they recommended a fusion of the Judicature and an economy of judicial strength, especially with reference to the Assizes, so as to admit of a reduction of the Common Law Judicature, which, of course, would admit of a substitution of Equity Judges. Two recent appointments to the Bench from the Equity Bar, in anticipation of this change in the composition of the Judicature, have already been made. The Act gives power to alter the arrangements of circuits, which would allow of single Judges holding the Assizes, while the Bill before Parliament contains power “to abolish, wholly or partially, any existing Circuit”—a policy which, if carried out as recommended, would allow, of course, of an indefinite reduction of the Common Law Judicature, and a proportional increase of the Equity Judicature. To carry out this policy, however, it was necessary that there should be a complete fusion of the Judicature, and a power to transfer Judges from one division to another of the Court thus to be constituted; and it was in pursuance of that policy that the Judicature Act passed, and the High Court of Chancery now ceases to sit, and in a short time will cease to exist, becoming merged in the High Court of Judicature.

*Law in New Amsterdam.*—“The Old Stadt Huys of New Amsterdam” is the title of a very interesting paper read last month before the New York Historical Society, by Mr. James W. Gerard, and now published in a pamphlet. Much of the paper is devoted to an account of the administration of law in old New York, and of the peculiar character of the lawsuits waged by that peaceable and simple-hearted people. The reader will be struck with the informal and patriarchal administration of justice, with the triviality of many of the disputes, and the ease with which the parties were reconciled. The love of fair play was evidenced by the refusal of the authorities to permit Adriaen Van der Douck, the first lawyer in the colony, to plead, on the ground that “as there was no other lawyer in the colony, there could be no one to oppose him.” The early litigants consequently advocated their own causes, or were represented by relatives or friends. The system of reference, or arbitration, was greatly in vogue, and the order of appointment directed the arbitrators to reconcile the parties litigant if possible. The compensation of the arbitrators consisted in a

"treat," the expense of which was equally shared by the parties, unless otherwise directed in the order of reference or the judgment. There being no State prison, the usual punishments were fines, banishment, the pillory, flogging, or confinement in a tavern or one's own house, or for a limited period with the town jailer in the city-hall. Imprisonment was sometimes accompanied by a diet of bread and water or *small beer*. Branding on the cheek was occasionally inflicted, and so was sitting on the wooden horse. It was unlawful to go nutting or picking strawberries on Sunday, and one person, caught with an axe on his shoulder on Sunday, escaped with a reprimand only by showing that he had been cutting a *bat* for his little boy. Sometimes the nature of the offence was indicated by the punishment, as when one who had stolen cabbages was condemned to stand in the pillory with cabbages on his head. The offence of stealing spoons did not originate in the early days of our late civil war, for we find that one individual was scourged and banished for committing that offence at a marriage feast to which he was invited. The merciful disposition of the Dutch settlers is illustrated by their reluctance to inflict capital punishment. On one occasion, nine negroes being convicted of murder, they were ordered to draw lots to determine which one should suffer for the rest; the lot falling on a prisoner of gigantic frame, he was suspended by two halters, but broke them both, and then he and the spectators begged so hard for mercy, that he was let off. Perhaps the fact that the murdered man was a negro had something to do with this leniency. Although thus lenient, the magistrates insisted on being respectfully addressed. Mr. Gerard says: "Ill fared it also with Jan Willemsen Van Iselsteyn, commonly called Jan of Leyden, who, for abusive language and for writing an insolent letter to the magistrates of Bushwyck, was sentenced to be fastened to a stake at the place of public execution, with a bridle in his mouth, rods under his arms, and a paper on his breast with an inscription, 'Lampoon writer, False accuser, and Defamer of Magistrates.' He was afterward to be banished." Among the causes of action we find, throwing a glass of wine at the plaintiff, calling him a "black-pudding," a "muff," or a "Dutch dough-face," tearing a woman's cap off her head, &c. Among the distinguished litigants we note Mrs. Anneke Jans Bogardus, who sued for the rent of the Bouwery. The defendant answered that he was not indebted, because he had bought off the rent for two hogs, and had delivered one of the hogs. The court very properly ordered him to "go the whole hog," and deliver the other. The defendant was afterward sentenced to be flogged and have his right ear cut off, for selling his wife. Jacob Leisler, subsequently dictator of New York, was sued by a servant girl for a year's wages, he having dismissed her before the expiration of the time. "The defendant answered, that inasmuch as plaintiff had consumed almost a bottle of strawberry preserves, also biscuit of his; moreover, as it came to his ears that she had two fellows



climb over the wall to her while he was in church with his wife, and received no service from her, he had nothing to do with her." Plaintiff denied having had the fellows climb over the wall, and claimed that the children ate the preserves. The court finally decreed that the defendant pay plaintiff a quarter's wages. This decision seems to have settled two historical facts and one legal proposition. First, that there were strawberry preserves in those days; second, that children in those days were fond of them; third, that it was no legal defence against a claim for wages, that a 'Biddy' should have a cousin or two to jump over the wall and pay a friendly visit while the 'folks' were at church." Rose Goele sued Francois Soleil, the gunsmith, for breach of promise, the defendant having refused to marry her, although the banns had been published and cohabitation had ensued. In addition to uncongeniality of temper, the defendant pleaded that the plaintiff had a bad breath. He doubtless thought that Rose, by any other name, would smell as bad. But he ought to have found out about her breath before. One should smell of a rose before he plucks it, or not afterward find fault with its fragrance. Mr. Gerard does not give us the result of this case, but we infer from Francois' declaration that "he would rather join the Indians than marry her," that Rose suffered no more from *coup de soleil*. A certain decision respecting the disposition of a stray pig, claimed by two different persons, neither of whom pretended to be the owner, was worthy of Solomon, namely, that "the pig shall be proclaimed by the deacons for eight days, and that they shall take her in default of right."

The foregoing are a few of the more amusing and curious incidents narrated in Mr. Gerard's paper. In conclusion, he warmly defends the Dutch colony against the representations conveyed in Mr. Irving's caricatures. He refers to the undoubted fact that New Netherlands was the true home of religious and political freedom on this continent. When the Puritans were hanging witches and Quakers, and whipping and banishing Baptists, the unhappy refugees found a safe asylum among our much-ridiculed Dutch ancestors. There was but one trial for witchcraft in New Amsterdam, and that resulted in acquittal. Slavery existed only in the mildest form; we read of a master applying to the Court for leave to chastise his negro wench for misconduct. The Jesuit fathers, fleeing from the Indians, were welcomed and protected. "The Indians too were protected from outrage." And in respect to the general administration of justice, so competent a critic as Judge Daly observes: "Upon perusing the records of the New Amsterdam Tribunals, it is impossible not to be struck with the comprehensive knowledge they display of the principles of jurisprudence, and with the directness and simplicity with which legal investigations were conducted. In fact, as a means of ascertaining truth and doing substantial justice, their mode of proceeding was infinitely more effective than the technical and artificial system introduced by their English successors."

*Appointments.*—Mr. John Burnet, Advocate, has been appointed to the office of Advocate-Depute, vacant by the appointment of Mr. Robert Lee to the Sheriffship of Stirling and Dumbarton.

Mr. J. M. M'Cosh, Solicitor, Dalry, Ayrshire, has been appointed Circuit-Clerk of Justiciary in place of the late Mr. Alexander Ingram, of Stranraer, whose death we mentioned lately.

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### Correspondence.

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#### PROPOSED "BRITISH LEGAL ASSOCIATION."

*To the Editor of the Journal of Jurisprudence.*

SIR,—There has lately gathered in Edinburgh, from all parts of the kingdom, the Continent, and other parts of the world, a large number of medical men, met under the name of the British Medical Association. Their object in this meeting was to diffuse information on their science, to raise and discuss questions upon which it is well known all medical men differ, and to give the members an opportunity of meeting with old friends, many of whom had not seen each other for years. To an outsider this gathering appeared most interesting, and fraught with the best results, social, moral, and scientific. The writer, belonging to another profession, while attending some of the meetings, and seeing many old friends, very naturally thought—Is there any reason why lawyers should not have a British Legal Association? For if not, there are so many reasons in favour of it that it only requires some members of the profession of energy and position to bring it into being. One difficulty no doubt is the dissimilarity of the law as administered in different parts of the kingdom, and consequently the papers might not be universally interesting to all the members, but this objection is not fatal, it appears to me, to the project. Nay, in our view it rather favours it, for on the other hand many lawyers might no doubt be glad to have an opportunity of hearing papers read on subjects which were viewed in a different legal light in different parts of the kingdom. There is ample scope for papers on the various branches of legal knowledge, and I feel sure I do not belie the *bonhomie* of my profession when I say that there is ample scope and every desire for that social intercourse which is one of the most pleasant features of such gatherings. Should this project be favourably entertained by others, it will give me great pleasure to do what in me lies for its furtherance.—I am, &c.,

JOHN P. COLDSTREAM.

5 EAST CASTLE ROAD, MERCHISTON.  
7th August 1875.

## Notes of English, American, and Colonial Cases.

**NEGLIGENCE.—Level crossing.**—The question in this case was, whether an omission to look and listen for an approaching train before attempting to cross a railroad track is, as matter of law, such negligence on the part of the person attempting to cross as will preclude his recovery for an injury done by a passing train while crossing the track. Upon this point, M'Ilvaine, J., who delivered the opinion, laid down the following rules:—"The failure to look or listen for an approaching train, though such failure may contribute to the injury, cannot, under all circumstances, be regarded as negligent. Whether it is or not depends on the circumstances of the particular case. . . . The exercise of ordinary care to avoid an injury is all the law requires; and no one can be held to be negligent who exercises such care. True, when the danger is imminent and human life is at stake, great precaution should be exercised; but this is only ordinary care under the circumstances, because persons of ordinary prudence, under such circumstances, exercise great caution and care. When, therefore, a person about to cross a railroad track, under a given state of circumstances, exercises that degree and amount of care which prudent persons usually exercise under like circumstances, he is without fault. In other words, when the circumstances are such that prudent persons would not ordinarily look or listen for an approaching train, there is no negligence in omitting to look or listen."—*Cleveland, Columbus and Cincinnati R. Co. v. Crawford*, 24 Ohio St. 631. But in Pennsylvania it is held to be negligence *per se* for a traveller to fail to stop immediately before crossing a railroad track.—*Pennsylvania R. R. Co. Beale*, 73 Penn. St. 504; S. C., 13 Am. Rep. 763; *North Pennsylvania R. R. Co. v. Heileman*, 13 Wright, 60.—*Albany Law Journal*, May 1.

**COMPANY.—Promoter—Contract—Prospectus.**—M. agreed with a patentee to purchase a patent for £85,000, to be paid in cash and shares, and to form a company to work it. Two months after he sold the patent to a trustee for a company, which was then forthwith to be formed, for £125,000, to be paid in cash and shares mostly defined. He became a director of the company. A prospectus was issued which disclosed the second agreement but not the first. On the faith of this prospectus G. took shares, but as soon as she discovered the first agreement she applied to have her name removed from the register of members, on the ground that the omission to disclose the first agreement made the prospectus fraudulent within the meaning of the 38th section of the Companies' Act 1867.—*Held*, that M. was not proved to have been a "promoter" at the time the first agreement was entered into; and that even if he had been, the contract with the company to take shares would not have been avoided, and the only remedy of G. would have been against M.—*Re The Coal Economising Gas Co. lim.*; *Ex parte Gover*, 44 L. J., Ch. 323.

**COPYRIGHT.—Monumental designs.**—Plt. employed W. to compile a work for him, called "Monumental Designs," being illustrations of tombstones, and intended as an "advertisement" in his business. W. registered the work as plt.'s property under 5 & 6 Vict. c. 45. Deft. printed several sheets of designs identical with those of plt., but only sold one of the sheets, and that sale was made to plt. himself. Deft., when remonstrated with, offered, after notice of motion for an injunction, to cancel the unsold sheets, and destroy the stones from which they were taken, but claimed to be paid his costs. Plt. refused such payment; and on the hearing of the cause, an injunction, previously granted, was made perpetual, with costs.—*Grace v. Newman*, 44 L. J., Ch., 298.

**NEGLIGENCE.—Injury to infant at railroad crossing.**—Where an infant child intrusted to the care and custody of another by the father, is injured through the negligence of a railroad company at a crossing, the custodian of the child also being guilty of negligence contributing to the result, although the infant may maintain an action for such injury, the father cannot, the negligence of his agent, the custodian of the child, being in law the negligence of the father.—*Bellefontaine Railway Co. v. Snyder*, 24 Ohio St., 670.

**ACTION UPON CHEQUE.**—*Absence of Effects in Drawee's hands—Whether Presentment Necessary—Cause of Action—Prohibition.*—Absence of effects in the hands of the drawee of a cheque dispenses with the necessity of presentment. The deft., within the jurisdiction of the Mayor's Court, drew upon a Huddersfield bank a cheque payable to the plt., the deft. having no effects at the Huddersfield bank, and having had notice not to overdraw. The plt. having sued the deft. upon the cheque.—*Held*, that the whole cause of action arose within the jurisdiction of the Mayor's Court, and a rule to prohibit discharged.—*Wirth v. Austen*, 32 L. T. Rep. N. S. 669. C. P.

**PACTUM ILLICITUM.**—*Agreement to Pay a Percentage for Lobbying a Claim through Congress—Attorney's Lien.*—N. P. Trist had a claim against the United States for his services touching the treaty of Guadeloupe Hidalgo. He made an agreement with Linus Child, who was an attorney, that Child should take charge of the claim and prosecute it as his agent and attorney before Congress, and as a compensation for his services it was agreed that he should receive twenty-five per cent. of whatever sum Congress might allow in payment of the claim. If nothing was allowed he was to receive nothing. Child prepared a petition and presented the claim to Congress, but before final action was taken by Congress he died. Congress appropriated 14,559.90 dols. to pay it. Trist refused to pay the twenty-five per cent. on the ground that Child, during his life-time, and his son and partner had after his death, neglected properly to prosecute the claim, and as a consequence he had been compelled to avail himself of other aid. The court below decreed that Trist should pay the twenty-five per cent., and enjoined him from receiving any portion of the money appropriated by Congress to pay the claim. The court *held*, 1. *No Lien.*—That appellee had no lien upon the fund in question. The understanding between the elder Child and Trist was a personal agreement. It could in no way produce the effect insisted upon. For a breach of the agreement the remedy was at law, not in equity, and the deft. had a constitutional right to a trial by jury, and if there was no lien there was no jurisdiction in equity. 2. *The Agreement Void.*—That the agreement in the present case was for the sale of the influence and exertions of the lobby-agent to bring about the passage of a law for the payment of a private claim without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interests of the agent at stake, contrary to the plainest principles of public policy, and is illegal and void. 3. *Agreement for purely Professional Services.*—That an agreement for purely professional services is valid. That within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments and submitting them, orally or in writing, to a committee or other proper authority, and other services of like character; but where such services are blended and confused with those which are forbidden, the whole is a unit and indivisible; that which is bad destroys that which is good, and they perish together.—*Burke (Trist's Exr.) v. Child*, *American Legal Journal*, June 9.

**LANDLORD AND TENANT.**—*Goodwill—Right of Outgoing Tenant under a proviso giving him all such sums of Money as shall or can be procured for the Goodwill—Mode of calculating Value of Goodwill.*—The plt. entered into occupation of a public-house under a lease from the owner, to whom (she having been the previous occupier), he also paid £300 for the goodwill. The lease contained the following clause: "And it is hereby lastly agreed and declared that at the expiration or sooner determination of the said term hereby created, or such sum and sums of money as shall or can be procured for the goodwill of the business of a licensed victualler in respect of the said premises from an incoming tenant, shall be received by and belong to the said William Llewellyn, his executors, administrators, or assigns." On the expiration of the lease the deft. re-let the house at an increased rent, and on payment of a premium by the new tenant of £1300. The deft. refused to pay anything to the plt. for the goodwill, and he brought this action against her to recover the value of it under the covenant in

the lease.—*Held*, that he was entitled to recover, as the deft. was bound to pay him either what was paid by an incoming tenant for the goodwill, or what she might have obtained in respect of it; and that the amount in the latter case was to be the sum which experienced valuers should determine to be the proper value payable by an incoming to an outgoing tenant.—*Llewellyn v. Rutherford*, 32 L. T. Rep. N.S. 670, C.P.

PROPOSAL AND ACCEPTANCE OF CONTRACT.—*Additional Term*—*Whether parties ad idem*—"Guarantee."—Two letters may be sufficiently identical to constitute a contract, although the letter of proposal may mention a term which is omitted to be mentioned in the letter of acceptance. The deft. signed a letter whereby he guaranteed to the plts. 259 subscriptions to the *Choir* newspaper, of which the plts. were proprietors, in consideration of the plts. giving him the free use of one column of space in such newspaper, and the deft. also undertook to insert the name of the *Choir* as his organ in a foreign newspaper. The plts. signified a letter agreeing to insert the deft.'s advertisements in consideration of the subscriptions being guaranteed, but omitting to mention the promise of the deft. as to the foreign newspaper, and afterwards added a postscript thereto to the effect that the payment of the subscriptions should be completed within a certain time.—*Held*, that the two letters formed a good special contract between the parties, which the addition of the postscript did not invalidate.—*Metzler v. Gounod*, 32 L. T. Rep. N. S. 656, C.P.

LANDS CLAUSES ACT.—*Payment into Court*—*Petition for Re-investment*—*Apportionment of Costs*.—Costs of payment out and re-investment of moneys paid into court under the Lands Clauses Act 1845, directed to be paid rateably by the various bodies who had paid the money in, the amounts varying very largely.—*Ex parte The Governors of St. Bartholomew's Hospital*, 32 L. T. Rep. N.S. 652, V. C. M.

OVERBEARING OR FRAUDULENT CONDUCT OF DIRECTORS.—*Suit by Individual Shareholder to restrain*.—Bill by shareholder on behalf of himself and other shareholders against a company and its directors alleging that in order to prevent discussion of a resolution proposed by the plt. at a general meeting, the chairman had, in collusion with other directors, and in order to stifle discussion, determined to carry, and had carried by show of hands, an adjournment of the meeting, and to refuse, and had refused, a poll on the question of adjournment, so as to prevent the use of proxies by the plt.—*Held*, on demurrer by a director who was not present at the meeting—first, that the chairman had not the absolute power to declare the meeting adjourned; secondly, that the bill was sustainable by a single shareholder as the acts complained of, though not *ultra vires*, were of an overbearing or fraudulent character.—*Macdougall v. Gardiner*, 32 L. T. Rep. N.S. 653, V. C. M.

COMMON CARRIER.—*Limitation of liability for loss of baggage*.—This action was brought to recover the value of a trunk and its contents, which was entrusted to defendant, as common carrier, and lost. It appeared that plaintiff took passage on one of deft.'s steamers for Europe. On paying her passage-money she received a printed ticket signed by deft.'s agent, which contained a clause which stated substantially, that the company was not to be held liable for loss or damage to baggage in any sum, unless the same shall have been proved to have been occasioned by the gross negligence of the company, or of its agents, nor in any event beyond 50 dols., unless a bill of lading or receipt therefore, specifying the articles and their values, and that money, jewelry and all valuables were at the risk of the passenger, unless placed in the company's charge and a bill of lading or receipt signed therefor. When plt. went on board her trunk was delivered into the custody of deft.'s agents, who assumed to take charge of it. At the end of the voyage defendant did not produce the trunk or in any way account for it.—*Held*, that there was sufficient evidence to sustain a finding by a jury of gross negligence, but that in the absence of a bill of lading or receipt, as specified in the contract, a recovery could not be had for over 50 dols., and no recovery could be had for jewelry or silverware. <sup>2</sup> *held*, that the rule that, in the absence of fraud, concealment or im-

proper practice, the legal presumption is that stipulations contained in a common carrier's receipt for freight, limiting his common-law liability, were known and assented to by the person receiving it, applies to carriers of passengers with their baggage.—*Steers v. L. N. Y. & P. Steamship Co.* Court of Appeals, N. Y.—*Albany Law Jour.*

## The Scottish Law Magazine and Sheriff Court Reporter.

### EDINBURGH SMALL DEBT COURT.

M'NAUGHTON v. M'VEY AND CALLAM AND CO.—July 9, 1875.

**Arrestment—Possession.**—Pursuer obtained decree for £9, 4s. 6d. against Lake, the patentee of a new description of grate. Lake, who had previously had a shop of his own in Forrest Road, Edinburgh, which he shut up on his removal to England, took a room or cellar from M'Vey from 26th February to 25th May, in which he deposited the grates which formed the stock of his shop in Forrest Road. Callam & Co. were braziers, and had agreed to sell Lake's grates for him; but no grate ever left the premises rented from M'Vey except when Callam & Co. had actually sold one to a customer. Callam & Co. held a key of the premises for the limited purposes of cleaning up and repolishing the grates when needful, and of operating delivery when they sold one. Lake having gone to England, leaving the £9, 4s. 6d. unpaid, the pursuer used arrestments against him in the hands of M'Vey and of Callam & Co. on 19th May. After the date of the arrestments Lake, having paid his rent to M'Vey, and having obtained the key of the premises from Callam & Co., removed his grates. Pursuer brought this forthcoming against M'Vey and Callam & Co. Pursuer contended, in the circumstances, Callam & Co. had possession of the grates, and relied on the decision in *Brown v. Blaikie*, Nov. 26, 1850. Defrs. relied on 2 Bell's Com., p. 70 (M'Laren's Edn.). The Sheriff-Substitute dismissed the action, holding that the grates were all along in the possession of Lake; that the landlord, M'Vey, whose rent was paid, had no power over them; that the possession of the key by Callam & Co. was for certain limited purposes; that the grates were removable by Lake at his pleasure, *via facti*, without any possible control on the part of either M'Vey or Callam & Co.

*Act.*—P. Morrison.—*Alt.*—G. M. Wood.

A. v. B.—22d July 1875.

**Expenses—Liability of agent for expense of printing Record.**—In this case (the decision in which is of considerable importance to law-agents) a firm of law printers in Edinburgh sued an agent for one-half of the expense of printing the record in an action in which the defr. was agent for the defr. in that action. The defr. denied any personal liability for the expense of printing the record. The S.-S. (Hallard), on 9th July 1875, with consent of parties, remitted "to Mr. Baxter, Auditor of the Court of Session, to hear the parties in presence of each other, and determine the question at issue." On 22d July 1875 the Auditor issued his award, holding the defr. liable for the one-half of the expense of printing the record, adding the following note in explanation of the grounds of his decision:—

"*Note.*—The general question raised in this case is of some importance, and I have given it careful consideration, but I am unable to perceive any ground, either in law or in equity, for the exemption claimed by the defr. Admitting as a general rule the liability of agents to printers for work ordered by them, either separately or jointly with the opposite agent in the course of a case, he pleads that the pursuer's agent alone is liable for the expense incurred in

printing the record. He founds this contention on the provision in the Court of Session Act of 1868 (§ 26), that 'the pursuer shall cause the pleadings which are to form the record to be printed, and shall,' within a certain period, 'deliver two printer's proofs thereof to the agent or to each of the agents of the other parties, and also to the Clerk to the process, who shall transmit the same to the Lord Ordinary;' and further, on the ground that the defr.'s agent has no part in the selection of the printer, and that there is no contract between them. The answer to these grounds of defence seems to me to be that although the initiative in the preparation of the print is laid by the statute on the party *in petitorio*, the record is truly a joint document, which parties are equally bound to place before the Court, and that the revisal and adjustment of it are carried through by the agents jointly. The print of the record supersedes the MS. copies which each party was formerly under the necessity of making for his counsel after the closing of the record, and the expense of these copies was defrayed by the agents for the parties respectively. Prior to the Statute of 1868 the printing of the closed record was in the discretion of the judge, but had been found so convenient that printing became the rule with very rare exceptions. Under that system the record was looked upon as a joint print payable by the parties equally. The Act of 1868 does not directly exempt the defr.'s agent from the liability laid upon him under the former system, and I am at a loss to understand how it can be maintained that merely because the initiative in printing at an earlier stage of the cause, and under serious responsibilities is laid on the pursuer's agent, he should personally be subjected to liability for the whole expense of furnishing copies to the Court, and also to the agents for the defrs., however numerous. The practice at present is to print off immediately after the closing of the record copies sufficiently numerous to supply the Lord Ordinary and the whole counsel and agents for the discussion in the Outer House, and also to provide for the contingency of any party to the cause reclaiming to the Inner House. The establishment of the rule contended for by the defr. would in my opinion be productive of results equally inequitable and inconvenient.

E. B."

### SHERIFF SMALL DEBT COURT OF ABERDEENSHIRE.

Sheriff COMRIE THOMSON.

NICOL v. MIDDLETON.—July 16, 1875.

*Vitiosus Intromission.*—The Sheriff's judgment which follows fully explains the case in question:—

The deceased Robert Middleton lodged with the pursuer, and at his death he seems to have been due her upwards of £5 for board and lodging. He left some wearing apparel and other articles in her house, which have been valued at £3, 12s. The defr. is his brother, and he buried him, making all the arrangements for the funeral, and paying in connection with the interment about £7. The defr. took possession of the clothes and all the small effects above mentioned, which had belonged to his brother. The pursuer now sues him for the account due to her by the deceased, in respect that he is a vitiosus intromitter with his moveable estate and effects. The only intromission alleged is the taking possession of the body clothes, &c., as part compensation to the defr. for the outlay which he had made in connection with his brother's burial.

I am of opinion that the pursuer's contention is not well founded, and that the intromission had by the defender does not subject him *passive* in payment of the debts of the defunct.

Vitiosus intromission consists, in the words of Erskine, "in apprehending the possession of, or using any moveable goods belonging to the deceased, unwarrantably, or without the order of law." It subjects the intromitter to the payment of all the debts due by the deceased. But, although every person who without title intromits, is in the legal sense of the word a vitiosus intromitter,

it does not follow that he is to suffer the penal consequences of vitious intromission. Universal liability is not the necessary consequence of vitious intromission (*Wilson v. Taylor*, 4th July 1875). The title has been introduced into our law as a check to fraud, and the penalty is so, that the Court ought to take into consideration every equitable and favourable circumstance which goes to exclude the presumption of fraud (Erskine, 3. 9. 53). Thus it has been held that the small value of the articles intromitted with, removing suspicion of fraud, saves the intromitter from liability: that where the intromission is necessary, as for example *custodia causa*, or for preservation, or where the widow or next of kin do no more than continue the possession had by the deceased for the behoof of all interested, and to save the goods from perishing. It is thus plain that the question whether a penal *passive* title has been incurred or not is one *in arbitrio judicis*.

In the present case there was a pressing necessity that the deceased should be buried. It naturally lay with the defr. to arrange for the funeral. The expense so incurred by him fell to be taken out of the readiest goods and gear of the deceased. The debt is highly privileged, it is preferable even to the landlord's hypothec—the policy of the law being to encourage respect for the dead.

It seems to me that it would be contrary to principle to hold that when the defr. employed the effects of the deceased to pay for an inexpensive funeral, he involved himself in the penal consequences of vitious intromission. It is also contrary to authority. In the case of *Gammel v. Barclay* (9th July 1724), the defr., upon his father's death, sold a stack of oats, and applied part of the price to the payment of the funeral charges, upon which the pursuer and others of the father's creditors insisted against him as a vitious intromitter. The Court found the intromission not relevant to subject the defr. to the passive title. Again, in the case of *Wilson v. Smith* (19th June 1772), the defr., in order to pay the funeral charges of her father, disposed of his body-clothes and chest. She was sued as a vitious intromitter, but the Court assoilzied her from the penal passive titles insisted on by the pursuer; and found that she could only be subjected in *valorem* of her intromissions. Finally, in the case of *Johnston v. Stevenson* (26th February 1830), a widow intromitted with the effects of her husband, and sold about the half of them, the proceeds being insufficient to pay the death-bed and funeral expenses, house-rent, &c. She was sued as having incurred the passive title, but the Court held that she was not liable personally in the debts of her husband. Lord Gillies, who advised the case, pronounced judgment in these terms—viz., “The claim by Stevenson (the pursuer) is unjust, ungracious, and illegal. It would not have been sustained at any period of our law.” It is therefore my duty to assoilzie the defr. in the present case.

*Act.—Watt & Stuart.—Alt.—O. Prosser.*

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Sheriff DOVE WILSON.

INNES v. GREAT NORTH OF SCOTLAND RAILWAY COMPANY.—July 22, 1875.

*Carriers Act* (1 Will. IV. cap. 68)—*Special Agreement—Risk Note*.—In this action the pursuer sought to recover from the defrs. £2, 18s. as the value of a barrel of haddocks, part of a consignment of fish sent by him to a salesman in Glasgow in the month of December last. The defence stated for the Railway Company was that the fish was consigned *at owner's risk*, and that the damage occurred through no fault on the part of the carriers, but was attributable to one of the hoops giving way in the journey, in consequence of which the top of the barrel came out, and the haddocks fell into the waggon and got dirtied. Consignee refused to accept delivery, and the Railway Company sold the fish in Glasgow, realizing £1, 2s. 5d., payment of which was tendered to the pursuer before the action was raised.

After evidence was led, the Sheriff assoilzied the defrs., and explained the grounds of his judgment in the following terms:—



The question in this case is as to the liability of the Railway Company for damage done to certain fish in being carried from Fraserburgh to Glasgow. The fish were packed in good condition at Fraserburgh, and were found in a damaged condition at Aberdeen. The barrel in which they had been packed had, from some cause, given way, and the fish been emptied into the carriage and destroyed. The evidence also showed that they were packed again in Aberdeen, and sent on to Glasgow, where they arrived, however, in a condition unfit for market. From the evidence it is not distinctly made out what was the cause of the damage. According to the pursuer's theory, it was some negligence on the part of the Railway Company; and, according to the defrs., it was an accident caused by the insufficiency of the barrel. The evidence does not enable me to say with distinctness what the true cause was. The damage may have arisen from an accident, or it may have been caused by negligence. In this state of the fact, the question is, Upon whom does the legal responsibility rest? According to the common law, a railway company is liable for damage if it receives goods as in a fit condition to be carried: the company must, at the common law, ensure their safe arrival. But in the present case, the common law liability was set aside by a special contract made in terms of the Carriers Act. According to that contract, which was duly signed by the pursuer, he undertook to free the defrs. from all loss in transit unless he could prove that the loss was caused by the wilful fault or negligence of the defrs. Now it has been frequently decided that such contracts are binding. The Legislature has left it to the Court to say whether such contracts are to be enforced, and has authorized courts not to enforce them if they find the conditions exacted by the carriers to be unreasonable. But it has often been decided that such contracts—or "risk notes"—as the present are reasonable, and that any party who, in consideration of paying less for the carriage, chooses to take upon himself the responsibility which would otherwise fall upon the carriers, is at liberty to do so. Now, applying this contract, there can be no doubt that the defrs. are free. The pursuer has left it doubtful whether an accident or negligence caused the damage; and in such a case he has himself chosen to undertake the responsibility. I may add that cases like this have been frequently settled in this Court, and may refer, in particular, to the case of *Ritchie v. Caledonian Railway Company*, which had the good or bad fortune to run the gauntlet of all the three Sheriffs. It was decided upon the relevancy by Sheriff Thomson, upon the proof by myself, and upon appeal by the Principal Sheriff. In the notes which were appended to those decisions, the views given effect to to-day, with all the authorities requisite to support them, were fully stated. That case was almost upon all-fours with the present, the only difference being that the cask contained whisky instead of fish. Following the authority settled by that case, and by many others, it seems to me quite clear that the defrs. are entitled to absolver. Traders must understand that if they are pleased to sign such risk notes as the one in this case, courts of law will enforce them; and that they cannot both insist upon their goods being carried at the cheap rate and upon having all the benefits they would have if the goods were carried at higher rates.

*Act.—J. Cruickshank and W. Moir.—Alt.—John Thomson.*

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Sheriff DOVE WILSON.

ROBERT CRUICKSHANK v. JOHN MUNRO.—Aug. 19, 1875.

*Life Insurance.*—This was a case in which the pursuer sought to recover from the defr. £16, 0s. 2d. (restricted to £12), being the amount disbursed by the pursuer in connection with the deathbed and funeral of the deceased George Cruickshank, for which disbursements the pursuer alleged that the defr. was liable in respect of his having vitiously intromitted with a sum of £17, 10s., payable by the Scottish Legal Assurance Society on the death of the said George Cruickshank, or in respect of an insurance effected by him with them.

Sheriff Dove Wilson said—The facts of this case are very simple. The deceased George Cruickshank was married to the defr.'s daughter. The defr. and his wife were members of the Scottish Legal Insurance Society. They were desirous that the deceased should join it. He refused, but he authorized them to make him a member if they liked. They did so, and paid the premiums regularly out of their own money. They kept all the papers necessary for the insurance, and on the deceased's death, drew the amount of the policy from the Society. The pursuer alleges himself to be creditor of the deceased, and claims against the sum paid under the policy, as falling under the executry. He claims to be ranked preferably for part of his debt, and *pari passu*, along with the other creditors, for the remainder. The defr. resists the demand on two grounds—firstly, that the money paid by the Society is his property; and secondly, that he is entitled to keep it in payment of debts due by the deceased to himself. The first defence proceeds on the assumption that the transaction between the defr. and the Society was equivalent to an ordinary policy of insurance effected by him or his wife on the life of the deceased. To the argument that an ordinary policy of the kind would be void under the Act 14 Geo. III., c. 48—he having had no insurable interest in the deceased's life—the defr. replied, firstly, that that is a matter with which the pursuer has no concern; and he maintained, secondly, the plea that the statute against wagering policies had no application to societies enrolled under the Friendly Societies Acts. The first reply would be sound were the insurance in question a wagering policy. The second reply is correct, but its effect is different from what was maintained. The statute declaring wagering policies null, has no application, simply because the Society, under its statutes and rules, never can, and in point of fact does not, issue anything resembling wagering policies at all. The transactions which the Society makes are not effected by policies. The persons insured become members, and their rights are defined by statute and by the Society's rules. These rules are certified under the Friendly Societies Acts, and form the contract between the Society and its members. Rule X. provides that "any healthy person between the age of one day and eighty years may be admitted a member of this Society, and at his or her death, *his or her heir or executor* shall be entitled to the benefits stipulated in the rule." The provision that the benefit shall accrue to the heir or executor is here very distinct. Then rule XX. is equally distinct. It provides that where the Society has "paid to any person or persons, provided with the necessary documents, and appearing to the officers and servants of the Society to be the proper parties, no further claim shall be chargeable on the Society by any other person or persons in respect of such member deceased, but such person or persons may have redress as provided in the 18 and 19 Vict., c. 63, sec. 31." The provision here is, that if the Society pay to a person (in possession of the documents), believing him the proper party—that is, the deceased's heir or executor, in terms of Rule X.—there is to be no further claim against the Society, but recourse may be had under the clause of the statute quoted. This clause 31 provides a summary way of settling for claims under £50. These may be paid (without the necessity of confirming) to certain of the deceased's relatives to be nominated by him, or failing his dying without such nomination (or his having revoked a nomination), then to such parties as to the trustees appear entitled to it under the statute of distributions, that is to the executors. If they pay the money to a wrong person, believing him to be the person so entitled to it, they are safe, but the concluding words are, that "nevertheless such next of kin or representative shall have his or her lawful remedy for such money so paid as aforesaid against the person or persons who shall have received the same." The sum and substance of these provisions, therefore, is that, by the rules and statute which form the contract entered into, the sums insured are due to the heir or executor of the member, and that if they are paid in error to any other person, the heir and executor has his remedy by action against such person. Although a third party makes the contract, the benefit will still go to the insured's representatives, and such a contract by a third party is quite legal. If a man chooses to

stipulate that the Society shall benefit some other person, there is nothing to prevent him, and under the Society's rules and the statutes authorizing them, the benefit must go to the person to whom it has been stipulated that it should go. It is the person who is enrolled as member, and not the payer of the premiums, who acquires the rights, and (if he have been enrolled with his own consent) incurs the responsibilities. I scarcely see any ground even on which the payer's rights can be stated so high as to give him a claim to hold the sum insured, until he is repaid the premiums. He has chosen to pay the subscriptions, and in the absence of any proved agreement to the contrary, they seem to me to be so many donations, just as if a man were to volunteer to pay his friend's subscription to any other association. Doubtless, the contract as thus understood is a different one from what the defr. and his wife were led to suppose they were making. The local agents of the Society were frank in explaining that they believed and represented to the defr. and his wife that the benefits would accrue to them. They stated that such transactions were numerous, that the Society made no objections to relations or even strangers entering each other as members, provided the person entered agreed, and that in such cases the insurances were always paid to the person who paid the premiums, provided he had the documents. The agents of the Society appeared to me to be acting in perfect good faith, but to have no conception that if the transactions really had the shape they were representing them to have, they would be acting not only against their own rules, but would be contravening, in a wholesale manner, the statute of George III. referred to, rendering it illegal for one person to insure another's life, unless he had some insurable interest in it. The real effect of the transactions, however, must be judged of, not by the agent's verbal representations, but by the written rules and statutes, which ought to have been in the knowledge of every one concerned. These considerations seem to me to dispose of the defence that the sum paid under the policy was the defr.'s property. As to the defr.'s claim to hold it for the debts due to him by the deceased, the defr. is in no better position than any of the other creditors, and must rank for his debts. The pursuer has sought to render the defr. liable for the whole debt claimed, on the ground that he was a vitious intruder with the sum in the policy. But this is too strict. The defr. in taking it acted *bona fide* in the belief that he was only taking his own, and it would be unfair, to add anything to his liabilities on that ground. He must have time to allow executors to be confirmed. It may, however, save the necessity of bringing these proceedings up again, if I state that the sum for which the pursuer has a preferable claim is just that which the defr. offered to pay, namely £8, 15s. 8d., and that he has made out a fair claim to rank as an ordinary debtor for the balance.

The case was continued for two months, in order that the defr. may have an opportunity of confirming himself as executor, if so advised.

*Act.*—A. F. Wight.—*Alt.*—Alexander Yeats.

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THE

# JOURNAL OF JURISPRUDENCE.

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## PACTA ILLICITA.

THE laws against usury naturally gave rise to a number of decisions relating to the legality of contracts. As there are now no such trammels upon the freedom of trade as usury laws, this branch of our subject has indeed lost all practical interest, but is nevertheless a proper study as well for the political economist as the lawyer.

Our own law relating to interest was founded upon that of Rome; we adopted the principles of the civilians in determining when it was due, and followed their policy of regulating by statute the amount to be exacted. Among the Romans a rate had been fixed so early as the period of the Twelve Tables. That rate, as afterwards amongst ourselves, varied at different periods. The tendency of the Roman legislation seems to have been rather favourable to money-lenders, as the rate of interest was high, and was increased. On the other hand, by British statutes, legal interest which, in the reign of Elizabeth, was 10 per cent., was gradually reduced, first to 8, then 6, and finally 5 per cent., at which it was fixed by 12 Anne, c. 16.

In Scotland, usury, or as it was called *ocker*, was condemned at an early period. It is laid down in the *Regiam Majestatem* that a "paction anent ocker or vsurie sould nocht be keiped," although the oath interponed thereto is to be observed. Usury was denounced as at once contrary to the revealed will of God, and prejudicial to the public good. Kames is of opinion that in itself it is innocent, but prohibited by statute with the view of preventing oppression; we suspect, however, that the oppression was not unfrequently upon the side of the borrower, who, if he lacked money, was often possessed of other and more formidable powers.

In the olden times the *ockerer* was looked upon as one following an unlawful calling, and making gain out of the misfortunes of his neighbours. When he died, the wealth which he had accumulated was not permitted to descend in ordinary fashion to his heirs, but

was escheated to the king. But it was provided that "ane ockerer sa lang as he lives may not be accused or convict," and in order to overcome the natural claim of the heirs, it was necessary to show that the usurer had up to the time of his death continued his evil practice, and died in an impenitent condition; for "gif he repent, and desistes before his deceis to use the samine crime, he, his heires, nor his gudes shall not be judged conform to the law of usurers" (*Reg. Maj.* ii. 54). It was thus, as Sir George Mackenzie observed, "Not the commission of the crime, but the continuance in it, which was punishable." The fact of usury had to be proved before a jury of "threttie-twa leill men," neighbours of the deceased.

Special acts of usury were defined by statute, which came to the assistance of the common law. The Act of 1594, c. 222, indeed sets forth, that although usury is a great crime, condemned by the laws of God and all commonwealths, it has been frequently used through want "of a certain pain and punishment." It accordingly provides that whoever should take more than the legal rate of interest, 10 per cent. (fixed by a previous Act), should be counted and esteemed a usurer, and permits the borrower to claim a release from his obligation upon revealing the nature of the transaction. Any informer, if the borrower failed to do his duty, was to be rewarded with the capital sum.

The various Scotch statutes just afford illustrations of the means adopted to evade the law. Thus some were in the habit of retaining a year's interest or annual rent at the time the money was lent. Another species of usury, which called forth a special Act, is thus described by Sir George Mackenzie. He speaks of a class of men who, "to cheat the law, colour their fraud by taking, not more annual rent directly than what is prescribed by the law, but taking wadsets of land from the borrower for more than their annual rent can extend to, and set back tacks to them for payment of what is agreed upon." It was usury to take a bribe for the loan of money, or for continuing the loan, and by the common law a man was forbidden to insert as a condition of a wadset, that redemption should not take place before a certain time. Even in those days, however, the question of how far these laws were to be enforced seems to have been raised, for we find Mackenzie putting the case of a merchant who, when he could have laid out his capital to greater profit in merchandise, lends it to a friend at more than the legal rate of interest, and asking if in that case he could be punished as a usurer. He himself seems to incline to an answer in the negative, there being no *animus fœnerandi* and no advantage taken of the debtor's necessity. However, it has been decided otherwise.

The short British Statute of Anne proceeds upon the narrative that the gradual reduction of interest has "by experience been found very beneficial to the advancement of trade and improvement of land," and that the state of public affairs renders a further reduction absolutely necessary. The penalty for taking more than 5 per cent.

was, by this statute, declared to be a forfeiture of the treble value of the money lent.

The numerous decisions under the heading *usury* in the Dictionary afford no points of interest, although serving to illustrate the difficulties with which commerce had then to contend. Public opinion worked slowly, and it was not until 1854 that the whole of the usury statutes were repealed, and the lieges left in perfect freedom to make their own stipulations as to interest. These statutes thus repealed were no less than twenty in number—of which five were English, five Scotch, four Irish, and six British.

Allied to this obsolete crime of usury was that of forestalling, an offence which even within recent times called forth the righteous indignation of the people. It may properly be touched upon under the head of *pacta illicita*.

Forestallers, the *Dardanarii* of the Roman law, were under our old statutes punished by imprisonment and the escheat of the goods bought and sold, two-thirds going to the king, and the remainder to the judge who conducted the trial. There were several varieties of the offence, which, strictly speaking, consisted in hoarding up one's goods with the view of creating a dearth and procuring ultimately a profitable sale. Hence all who purchased, with the intention of thus hoarding, came to be considered as forestallers. It is obvious, however, that this must have been a crime somewhat difficult of proof, as it had, according to Mackenzie, "to be inferred from presumption." It also amounted to forestalling to purchase goods on their way to open market, if at least with a design to deprive the general public who frequented that market of their chance of a purchase. Another variety consisted in advising sellers to raise their prices, or not to come to any particular market-place; and lastly, it was forestalling to buy for the purpose of re-selling at the same or any other market-place within four miles. Whether from the leniency of our public prosecutors, or from the low state of our commerce, we know not, but the crime of forestalling seems to have been one seldom brought before the Scottish Courts. In England, however, there have been comparatively recent trials at common law, and in the good old times of George the Third, forestallers met with no mercy.

Another set of transactions struck at by our ancient Scottish statutes, although applying but to one class of the community, should be noticed here. The Statute 1594, c. 216, prohibits what is generally known as the "buying of pleas." No judge or practising lawyer is, upon pain of loss of office, to purchase any debateable right while in dependence before the Court, a provision doubtless very necessary at a time when corruption was more than suspected in our judicial proceedings. The Act itself merely specifies "lands, teinds, rooms or possessions," but it was at an early date so interpreted as to cover all rights, whether heritable or moveable. The question seems to have been raised, more than once, whether the purchase remains valid in spite of the forfeiture of office.

In the case of *Home v. Home*, Dec. 15, 1713, M. 9502, it seems to have been decided that the right so acquired is not null. But looking to some remarks from the bench, in a more modern case, this decision is of doubtful authority (*Johnstone v. Rome*, Feb. 1, 1831, 9 M. 364). This Act is not in desuetude, and has been under judicial consideration within recent times. The statute applies only to rights which are actually the subject of litigation at the time when the bargain is entered into. But by our adoption (at all events to some extent) of the Roman principle concerning a *pactum de quota litis*, the practising lawyer is prevented from entering into bargains for a share of the property concerning which there is an intended litigation. How far this principle extends, is well illustrated by the case of *Johnstone v. Rome* (*supra*), a case which it was unsuccessfully maintained came under the above-cited statute. The pursuer was a country writer who had interested himself in the case of a poor and ignorant man, who had a claim to a small property. He proposed to his client, as the conditions upon which he would conduct the lawsuit, that if unsuccessful he would make no charges whatever, but that if successful, one-half of the property to be recovered should fall to his share. The client consented to these terms, binding himself solemnly to fulfil the whole of the agreement. The case was held not to come under the statute, because there was no actual plea, the action not having been raised. But, nevertheless, the settlement was set aside by the Court, the client being held, in spite of it, entitled to the whole of the property recovered, and the agent's claim limited to professional charges. But the Court looked in this case to the fact that the risk run by the agent was not great, there being no nice point of law to settle, but a tolerably clear matter of fact, and from the remarks which fell from the bench it would rather appear that where, from the risk incurred in a litigation, the agent's stipulation appeared reasonable, the contract would not be illicit. The bargain, according to Lord Glenlee, is not to be set aside if it appear "that the transaction was very reasonable indeed." When the lawsuit is at an end, the agent and his client may make what arrangements they please regarding the spoil.

Bonds affecting the liberty of the subject were viewed by the law with disfavour even at a time when the modern reverence for liberty was unknown. "It was a very common thing," says Mr. Ross, in his lectures, "both in England and Scotland, for great lords to increase their prowess by hiring professed soldiers to attend them in war. To these they gave life-annuities, and sometimes lands. It was also the custom for people, unable to defend themselves, to bribe the protection of their powerful neighbours, by giving part of their lands or annuities out of them; and these deeds were termed bonds of *man-rent*, i.e., one man renting or engaging the defence of another." Stair terms this *man-rent* a kind of bondage, "whereby free persons became the *men* or followers of those who were their

patrons and defenders." Of course the tendency of such a system was to strengthen the hands of every petty despot, and divert men from engaging in the service of the country. Accordingly we find, so far back as the year 1457, it provided by Act of Parliament that "na man dwelland within burgh, be founden in man-rent, nor ride in rowte in feare of weir with na man, bot with the King or officiares, or with the Lord of the burgh that they dwell in, or with their officiares." An Act of James the Sixth prohibited the making of any such bonds "upon quhatsumever cullour or pretense," without the king's consent. Contracts by which a person became bound to perpetual service might be lawfully entered into, in the case of the unfortunate colliers and salters, who were by express statute placed as a class under a sort of servitude. Accordingly, when a collier gave his bond to serve and work all the days of his lifetime to one laird, he was not allowed to desert to the service of another. The *allegiance* that such an engagement was "*contra bonos mores* and Christian liberty, and of the nature of a bond of man-rent," was repelled (*Caprington v. Geddeu*, March 24, 1632, M. 9454). We find traces in Fountainhall of a curious attempt to extend this exception to other classes of labourers upon the plea of local custom. "I reported," he says, "the Laird of Woodney against Reid, Beverage and Bruce, his fishermen, and Forbes of Foveran, claiming them as master, mentioned 31st July 1696. Woodney claimed them as bound to serve in his boat by a tack passed betwixt them. Foveran contended they were born on his ground, and so by the custom of all the coast side were *glebæ adscriptitii*, and could not hire themselves to another without his consent no more than colliers and salters may do." The cause of liberty however triumphed. "The Lords, finding there was no law astringing fishers to the ground where they were born, and that the custom was not general, but only in some particular places, they condemned it as *corruptela* and unlawful, and tending to introduce slavery, contrary to the principles of the Christian religion and the mildness of our Government." They accordingly found the fishers free to engage with whom they pleased. The Court even went the length of freeing such men from engagements, which they had voluntarily undertaken, when prejudicial to liberty. A contract by which fishermen bound themselves to serve certain boats was reduced in the case of *Allan*, 1728, M. 9455.

It may have been their regard for the liberty of the subject that caused our judges, in the last century, to set themselves so resolutely against all combinations of workmen for the purpose of raising wages. We suspect, however, that political prejudices had more to do with it. Be this as it may, there is no doubt that in the Civil Courts, at all events, the mildest form of trade union was viewed as an illegal combination, and its agreements were *pacta illicita*. To the criminal aspect of this question we shall presently refer. In the Court of Session the decisions are quite consistent



and clear. Perhaps no branch of our subject is more interesting in these days of gigantic strikes, when public opinion upon the whole question of labour and capital has undergone so great a revolution.

Turning to the invaluable Morison we find, under date January 21, 1766, a curious specimen of the old partizan style of legal reporting, which as it is short, we may here quote: "The journeymen weavers in the town of Paisley, emboldened by numbers, began with mobs and riotous proceedings, in order to obtain higher wages. But these overt acts having been suppressed by the authority of the Court of Session, they went more cunningly to work, by contriving a kind of society, termed the defence box; and a written contract was subscribed by more than six hundred of them, containing many innocent and plausible articles in order to cover their views, but chiefly calculated to bind them not to work under a certain rate, and to support out of their periodical contributions those who, by insisting on higher wages, might not find employment. Seven of the subscribers being charged upon the contract for payment of their stipulated contributions, brought a suspension, in which it was found: That this society was an unlawful combination, under the false colour of carrying on trade, and that the contract was void, as *contra utilitatem publicam*" (*Barr v. Carr*, M. 9564). Here we have a specimen of the simple trade-union, not accompanied with violence of any sort. In a later case we find the Court, in order to put a stop to a similar combination, having recourse to an extraordinary exercise of the *nobile officium*, or some such mysterious power. The rubric in the case of the *Corporation of Master Shoemakers in Edinburgh v. Marshall and others*, Dec. 11, 1798, M. 9573), informs us, that "where journeymen in a body give up working with a view to force a rise in their wages, the Judge Ordinary, in order to break the combination, may ordain them to return for a limited time to the service of their former masters, although they should have been under no contract to do so, unless satisfactory reasons for not returning can be pointed out by individual journeymen." This was of course nothing more nor less than a punishment inflicted by the Civil Court. It seems to have originated with the Sheriff, who fixed a period of compulsory service for one month at least. The men who resisted pleaded the liberty of the subject, and that they had full employment upon their own account. But they pleaded in vain. "The Lords, while they had no doubt but that every journeyman might quit his master's service, *debito tempore*, were equally clear, on the ground stated for the chargers, that in the circumstances of this case the Sheriff's judgment was right." One or two, however, escaped upon special grounds, satisfactory to the Court. This view of trade-unions was countenanced by the House of Lords. In the case of the Postmasters of Edinburgh, who had fixed a certain rate for posting, and advertised that rate in the newspapers, Lord Chancellor Lough-

borough, referring to these circumstances, said, "By this, your Lordships know, they were imposing a law to demand from the public a certain and fixed rate for posting, which was illegal and unwarrantable. The case is very different whether an individual might or might not ask what rate of posting be thought fit; but he must not make a party business of it."

In all these cases it will be observed there was no act of violence, nor could it be said that the public peace was in any danger. But nevertheless, in the eyes of some of our judges, such combinations were no trifling matter, and their enormity began to wax greater as the times became more troublesome. Thus, in 1808, Lord Justice-Clerk Hope could see in them an infringement of the freedom of the subject, an extension practised against the public by means which struck at the vitals of order and civilized society, downright usurpation, and an assumption of sovereign authority.

We can trace the influence of the French Revolution in bringing about what was really a change (fortunately a temporary one) in our criminal law. In the last century, it seems to have been more than doubtful whether the Criminal Courts could deal with the members of a trade combination, upon the simple charge of a combination. In 1808 the matter was fairly discussed in the case of Taylor and others, who were members of a combination of paper-makers, and the decision in that case was one in favour of the prisoners. It was held by a majority of ten judges, Hume informs us, that such a combination did not "imply that degree of baseness or depravity in the confederates which were essential to the notions of an indictable crime." How unwilling the Court was to make this a new offence is very clear from their finding in a later case, which was to the effect—"That though relevant matter might be selected from the charges made in the indictment to infer criminal punishment, they stand too complicated and embarrassed, in the detailed statement of them there, to afford that clearness, precision, and simplicity which is suited for criminal accusation and jury trial." But the persistence of Tory prosecutors was rewarded at last. In 1813 a number of cotton weavers were convicted of illegal combination; shortly afterwards there followed one or two other successful cases, and Hume could say, "This new point of dittay seems therefore now to be thoroughly established." But the new point of dittay did not long continue, the Act of 6 Geo. IV. c. 129, for ever emancipating innocent trade unionists from the terrors of the Justiciary Court.

Curious light is thrown upon the ancient treatment of criminals in the case of *Wedderburn v. Monorgun*, March 6, 1612, M. 9453, in which it was held that a paction of perpetual banishment in lieu of assythment for slaughter, was unlawful without the king's consent. That contracts of this kind were not unknown, appears from the report, which says that "it was remembered that the laird of Drum and my Lord Forbes obtained the king and council's

consent to their contract of banishment of John Forbes of Cos-sundie, and his accomplices, and that the decret-arbitral betwixt the Arthonis and Walleis for banishment of the Walleis was not sustained until it was ratified by the King."

In the case of *Stewart v. Galloway*, June 3, 1752, we find the Court refused to give effect to a bond, which had been granted to an officer of Court, in order to secure a pardon for a crime. In the curious case of *Grant v. Davidson*, August 2, 1786, M. 9571, we find a man who had been guilty of fornication agreeing to pay a small sum to the kirk treasurer, with the view of having all proceedings against him quashed, and afterwards refusing to fulfil his engagement, on the ground that it was illegal. But the Court here held that "as the practice of bargaining with kirk-sessions for irregularities of this kind has long prevailed in Scotland, and the money thence arising forms a very considerable branch of the poor's fund; so there do not appear sufficient legal grounds for preventing it in future."

Within modern times, at least, we find our Courts consistently opposed to every kind of paction by which the purity and efficiency of posts of public trust might suffer. Everything of the nature of a bribe to obtain such posts, and every transaction which might affect in a prejudicial manner the performance of their duties, has been treated as illegal, and set aside. In the old case of *Dalrymple v. Shaw*, Feb. 1, 1786, M. 9531, the Court were agreed "that it is *contra bonos mores* and illegal for those in power procuring from Government offices to other people, to stipulate a sum of money or any of the emoluments either to themselves or to third parties." In that case it was pled that public offices were sold every day, and amongst others is instanced that of the Clerkship of the High Court of Justiciary. In the case of *Mason v. Wilson* (November 28, 1844, 7 D. 160), an agreement between a Depute and Assistant-Clerk of Session—by which the latter was to do the whole duty for a certain remuneration—was set aside as contrary to public policy. Lord Jeffrey observed—"What settles the illegality of the contract is, that the surrogated person is a public officer. If a private person had been appointed, it would have been different. The sting of the thing is the consolidating two offices, which the public are entitled to have separately, with the services of two officers. The *presumptio juris et de jure* is, that the service of two officers is necessary for the proper discharge of the duties." In another case it was found illegal to agree that a public office should be held in trust by the keeper for another party, to whom he should pay the emoluments. The remarks of Lord Fullerton in that case are worthy of note. He says—"In many cases of that kind the transaction may in itself involve no impropriety or illicit consideration. When a party appointed to an office, and entitled to its emoluments, agrees in consideration of an advance of money, or in payment of a lawful debt, or for any other consideration in itself legal, to assign the whole or part of the emoluments of the office, the transaction

itself stands clear of any objection; and the only ground for refusing effect to it is, the supposed inexpediency of separating the duties of the office from the emoluments, and the consequent interest on the part of the public that the emoluments thus held to be essential to the due and effective discharge of the duties shall not be alienable to a third party" (*Ord v. Hill & Paul*, May 21, 1847, 9 D. 1118). In England there seems to be some difference of opinion as to the assignation of salaries, etc. Lord Eldon has laid down that a pension for past services may be alienated, while that for supporting the grantee in the performance of future duties is inalienable. The distinction here is obvious.

It is surely to our national credit, that simoniacal practices do not appear to have ever been common in Scotland. It may perhaps be urged, however, that the poverty of our livings would not afford much inducement to this vice. "No questions," says Mr. Dunlop, in his *Parochial Law*, "appear to have come before the Court of Session as to the invalidity of presentations in respect of simony, although they have had occasion to determine whether pactions with reference thereto were lawful when these were attempted to be enforced." In England, bonds by which the presentee agreed to resign at a future period in favour of another person named, are, or at least were, not uncommon. In Scotland such bonds would have been clearly illegal. In fact the Court seems to have watched jealously, in the interest of the flock and of the benefice, every transaction between the minister and his parochial potentates. Where a minister, in one case, had bound himself, for a sum paid down, never to bring a process of augmentation, the Court set aside the agreement as a *pactum illicitum* (*Boyd v. Earl of Galloway*, Jan. 22, 1794, M. 9583). This certainly was going very far. The benefice could not be proved to have suffered by the transaction, as no one could have compelled the incumbent to bring an augmentation, and his successor's claim to insist upon one was only strengthened by the delay. Nor can the raising of a process of augmentation, however proper an act in the eyes of lawyers, be termed one of the duties of the sacred office.

Downright simony could hardly have been attempted with success in a country where the people were ever on the alert to pick flaws in the hated system of lay patronage. But we have one or two curious specimens, of an indirect species, preserved to us in the books. When the parish of Anwoth became vacant in 1769, the patron intended to present a particular individual, but was persuaded from doing so by local influence exercised on behalf of a neighbouring laird's son. This young gentleman was accordingly appointed, but on condition that nominally a friend should pay an annuity of £20 to the disappointed candidate, which was actually to be paid in an indirect way out of the teinds due to the minister himself. A failure in payment resulted in an action, a rash proceeding, for the Court not only declared the whole transaction simoniacal,

but fined the principal parties concerned (*Maxwell v. Earl of Galloway*, January 19, 1775, M. 9580).

Even an undertaking by the friends of the candidate, to relieve the heritors of a parochial burden, in order to secure their interest, has been set aside as illegal, and the guilty parties punished by fines (*Steven*, February 20, 1759, M. 9578).

We have, however, now given sufficient illustrations of our subject, and must conclude. Its main interest is, as has already been indicated, historical. A study of the gradual change of opinion by which what was formerly viewed as a serious *pactum illicitum* has come to be regarded as innocent, if not rather meritorious, and *vice versa*, ought to attract many who are not professional lawyers.

## ANECDOTES OF LORD BROUGHAM'S EARLY HISTORY.

You may not like Lord Brougham; you may have no respect for his personal character or his political character (assuming that the latter had any existence independent of the former); you may fancy that he was not only a consummate orator, but also a consummate inventor of facts; that his faculty of imagination grew with his growth and strengthened with his strength, until, in his closing years, in obedience to the law of the strongest, it killed off all his other powers, and his mind became of imagination all compact. You may have an opinion of this kind in greater or lesser strength; but you cannot possibly help reading everything about the marvellous man. The very best things in Mr. Greville's *Memoirs*, in which he faithfully recorded the hatreds of every day, were the stories about Brougham,—the stories which displayed his dash and brilliancy, his energy, his humbug, his mendacity, his vanity, his ludicrous pretension to omniscience. The reason why we care to read everything about Brougham is not far to seek. We do so simply because of the wonder and admiration we have for the Titanic force of the man.

For the following *ana* of Lord Brougham's early career, a matter naturally enough of special interest to Scottish lawyers, we are indebted to a veteran lawyer, whose legal note-book contains the gatherings of more than half a century:—

### I.

In the end of last century a distinguished citizen of Edinburgh was induced to write a comedy. The night of performance came, and the friends of the author crowded the theatre to applaud the efforts of the young Shakespeare of the North. The first act was most patiently endured on the score of friendship, but its sad dulness prevented one token of approbation. The curtain arose on the second act, and the friendly audience were fondly hopeful

of some improvement with the advance of the plot, but matters were becoming worse. Impatience now sat visibly on every countenance, and a general feeling existed that the piece might be politely "*damned with faint praise*," and gently consigned "*to the tomb of all the Capulets*." At length a supper-party was exhibited, and one of the *dramatis personæ*, in dull prosaic strains, put the question to his companions around the scenic board, "*What toast shall we next give?*" No sooner was the question put than an answer was loudly heard from the centre of the pit, "*Drink good afternoon, if you please*." A peal of laughter followed the appropriate reply, in which the actors themselves were compelled heartily to join. It was impossible longer to persist in the dull display. The curtain fell alike on the actors and the act, which was thus gently laughed into oblivion. The voice proceeded from a young man then a student in Edinburgh; his name was *Harry Brougham*. How many times since then has his power of sarcasm driven bad men and worse measures from the political stage, and bidden "*good afternoon*" to many a flagrant abuse long played at the nation's cost.

## II.

A town in Scotland delights in certain traditionary facts connected with the early history of a great man. It is one of the towns of the Northern Justiciary Circuit. There dwelt an official, a man of wealth, highly respected, and given to much hospitality. His widow recently died at the ripe age of ninety years. She was just such a lady as would have been canonized by Dean Ramsay. She was full of anecdote, spoke the pure Doric, and eloquently upheld the past age over the degeneracy of its successors. Her husband was in use to invite all young advocates who went Circuit to his house and table. Sixty years ago, a young counsel made his first Circuit, and, it is said, earned his first fee in an appeal case—a source of revenue now extinct. He received the usual invitation to dinner. The day was exceedingly cold; and so soon as the newly-fledged barrister entered the drawing-room, he observed that the grate was monopolized and deformed by a large mass of coal, from which was emitted no particle of heat. At once, and without leave asked or obtained, the young jurist seized the poker, and with one strong, impulsive, and fell blow, he inflicted a compound fracture on the black diamond, and made the flames to leap upright and shed their light and heat around the apartment. The matron of the house stood astonished at this daring act of a stranger, and remarked, "Young man, d'ye no ken that nane shud meddle wi' a fire till seven years acquaint wi' the house?" The smart reply was, "I know no such rule; but know that the use of coals is to burn and give forth heat." The lady, thereon, sarcastically observed to her spouse, "Tak' ye notice, that birkie is sure either to mak' a spune or spoil a horn." The good old lady's prediction was sybilis-

tically soothfast. Many a spoon, both horn, silver, and gold, has the same person made; and it may be some few useless, brutish horns have been unavoidably spoiled in the process of manufacture. It was not from any doubts of Dr. Black's theory of *latent* heat that he committed the daring deed of violating the privacy of the fire-place, and interfering with the *lares et penates* of the domestic circle; but he early had intuitive notions of utilitarian policy—"The greatest good to the greatest number." He was an experimental philosopher after the school of James Watt, and delighted in the expansive power and diffusion of heat set at liberty and imparting force. Many a severe stroke has he since inflicted on dark and black masses of corruption, and has invoked heat and light where before nothing had existed save cold and deadness. It is needless to add, that the young Scotch advocate was *Henry Brougham*, and the Lady Prophetess lived to see the object of her censure and vaticination the honoured occupant of the Woolsack, as Lord Chancellor of England.

### III.

In the beginning of this century, William Hall, overseer of a farm in Selkirkshire, Scotland, was leaning against the dyke of the farm-yard, patriarchal-like meditating at evening-tide, while a young gentleman came up to him, wished him a good evening, and observed that the country around looked beautiful. The two getting into conversation, Hall, after a few observations, asked him "Whaur he was gaun?" The stranger answered that he intended going to Jedburgh. "And what business can ye ha'e at Jeddart?" says Wull. "Oh," says the gentleman, "I am going to attend the Circuit Court, but my feet have failed me on the road;" and, observing a pony in the farm-yard, he said, "There's a nice bit pony of yours—is it to sell?—would you like to part with it?" "I wadna care," says Wull, "but ma brither Geordie, he's the farmer, he's at Selkirk the day; but if we could get a good price for't, I daresay we micht part wi't." "What do you ask for it?" says the other. "Ma brither," quoth Wull, "says it's a thing we ha'e nae use for, and if we could get aught of a wiselike price for't it would be as weel to let it gang." There were only two words to the bargain; the gentleman and Wull agreed, and the sale was completed without missive or sale note. "But," says the gentleman, "by the way, I cannot pay you to-night; but if you have any hesitation about me, my name is Henry Brougham, and I refer you to the Earl of Buchan, or Mr. George Currie, of Greenhead, who will satisfy you." The residences of this nobleman, and Henry's brother advocate, Mr. Currie, were in the neighbourhood. On this reference, without making any inquiry, Wull immediately gave the gentleman the pony, with the necessary trappings. Wull, being a man of extreme orderly habits, went early to bed, and soundly slept, without either nightmare or pony, and the next morning, when the business of the

farm called him and Geordie together, says Wull to Geordie, "Ye was unco late in comin' hame last nicht; I selt the powny." "And wha did ye sell it to?" says Geordie. "Oh, to a young gentleman." "And what did ye get for't?" Wull having mentioned the price—"My faith," says Geordie, "ye hae selt it weel." "But," says Wull, "I didna get the siller." "Ye big idiot! ye didna gi'e awa' the powny without getting the siller for't? Wha was he?" "Oh, he ca'd himsel' Henry Brougham; and he said, if I had ony jalousin' aboot him, that the Earl o' Buchan, or George Currie, the advocate, the laird o' Greenhead, would say he was guid enough for the money. Oh, he was a very honest-looking lad; I could hae trusted onything in his hand." Geordie's temper became quite ungovernable at Wull's simplicity, and he was nearly subjecting him to Jeddart justice. After the whole Southern Circuit was finished, there was no word of payment, and Wull's life became quite miserable at Geordie's incessant grumbling and taunting—the latter ever and anon repeating, "What a confounded idiot, Wull, was ye to gi'e the beast awa' without the money to a man ye kenned naething aboot, and who very likely is jist ane o' the genteel vagabonds frae Lunan;" and the other as pertinaciously insisting "that he (the gentleman) was an honest-looking man: there's nae fear o' him." In the course of six weeks, an order came for the price of the beast. "Weel," says Wull, "didna I tell ye he was an honest man? I kenned by the very look o' him." From that moment Wull stood eminently high in Geordie's eyes; and while the one chuckled at the penetration of character, the other was no less humbled at having called his superior judgment in question. Wull lived to discover that his estimate of character, *ex facie*, was not unfounded, when, after a brilliant career, the buyer of the shelty became the occupant of the Woolsack.

IV.

Brougham was called to the Scottish Bar in 1800, and one of his first cases was a *cessio* at the instance of "Edward Roger, confessor in Falkirk, present prisoner within the Tolbooth of Stirling." His creditor, incarcerator, and objector was Mary Mitchell, residing in Camelon. He had embezzled the poor woman's funds on pretence of managing her affairs, and had brought her to poverty. Brougham was for the woman and opposed the application. The pleading is called "Objections," and is subscribed "Henry P. Brougham." The date is 10th December 1801. "J. M'Kenzie" is marked as agent.

The following extracts will not be without interest to those who delight to contemplate the genesis or germ of great men:—

"In compliance with your Lordships' desire, the objector shall now proceed very briefly to state a few objections to the claims of the pursuer for a *Cessio Bonorum*, and she is fully confident that very little need be said to show most clearly how untenable and how indecorous the bank-



rupt's plea for mercy is, and how necessary it will be for your Lordships to refuse extending to him that indulgence which the humanity of our laws has provided for the sole case of failure by unavoidable misfortune. . . .

"The manner in which her claim was originally constituted, and the whole history, indeed, of her connection with the pursuer, will deserve your Lordships' attention in judging as to his pretensions to the character and privileges of an unfortunate man. It has been most clearly established in the cause before the inferior court that the objector, an aged person, bowed down alike with infirmities as with poverty and years, became suddenly, by the death of her brother, entitled to a property of about £300 sterling—a sum far more than adequate to her utmost wants or desires: That the pursuer, by obtaining under various false pretences a power of managing her affairs, drew the whole of her funds, and appropriated them to his own use; and that, under the gross and impudent pretext of obtaining an extension of his commission, he actually made her sign a paper which she thought contained such an extended factory, but which he has since produced in process as a full discharge receipt and exoneration.

"This simple statement requires no comment; it scarcely needs the aggravation of those means used to favour the fraud in order to entitle it to your Lordships' execration. As if the mental infirmity natural to eighty years of sickly old age<sup>1</sup> was not a sufficient aid to his imposture, he administered doses of strong liquors and noxious drugs, which rendered every chance of detection at the time impossible, and which well-nigh covered up his villany for ever by terminating a little before the appointed period the trials and sufferings of his wretched neighbour. . . .

"Were the objector obliged to conclude here, she would confidently maintain that a strong case of objection had been made out. She would submit that her counsel did not use too strong language<sup>2</sup> when he offered to show at your bar 'a transaction unequalled even in the common business of criminal courts,' and she would call upon your Lordships to make the evident and legal distinction between a man whose debts are the result of those misfortunes against which innocence is no security, and him whose own crimes have brought him to jail, either as a culprit or a debtor. If a proof of negligence or idleness in carrying on his business, or extravagance in spending profits, is at all times a sufficient objection to the debtor's claim for your Lordships' compassion, surely the most fraudulent conduct in obtaining the respondent's property, and the most criminal dissipation in squandering such ill-gotten wealth, are abundant reasons for refusing the present application, more especially when those reasons are urged by the very person who has so cruelly suffered by his crimes. . . .

"But your Lordships will be pleased to attend to the following circumstances, which prove further fraud on the pursuer's part, and entitle the man, whose former conduct had substantiated his character as a *swindler*, now to put in his claim to a place amongst those whom the law denominates *fraudulent bankrupts*. The money obtained from the debtors of the objector was in great part paid to the pursuer at Candlemas last, when

<sup>1</sup> The young advocate, fortunately for his country, lived to *disprove* that mental infirmity is the *natural* result of eighty years of life.

<sup>2</sup> From this it would appear that the young orator had been checked from the Bench for using language too strong, for which he atoned by repeating it in print.

bills to the amount of about £300 became due; so that, between Candlemas and the time of his incarceration, the pursuer spent almost all this money. When your Lordships see a man in the station of confectioner at Falkirk—a rank, surely, of no great splendour—living at such a rate for a considerable space of time, and during that very period prior to his failure, when the law would not allow any transfer of his property, you will be very apt to suspect that the style of his living and the magnitude of his expenses are a little exaggerated in his Statement, notwithstanding the uncommon capacity for '*spirituous liquors*' which one set of vouchers proves him to have had, and the elegant taste for travelling in '*post-chaises*,' which, from another set of accounts, we find he was gifted with. But, even if your Lordships should not be inclined to suspect a concealment of collusive alienation upon that ground merely, the objector has a right to state the very extravagance of the articles of expenditure as a sufficient objection to a *cessio*. Either he has squandered the money of others, fraudulently obtained, with a certain knowledge of his approaching failure, or he has alienated or concealed that money, in order to elude their just claims, and whether the alienation has been made from dissipation or fraud appears a matter of little moment. . . .

"The objector shall only further request your Lordships to consider the nature of the misfortunes to which the pursuer has attributed his failure. These consist of a variety of very trifling losses during *seven years* of his business; all but a few articles are reducible to the heads of *bad weather* and his *father's debts*. As to the first of these causes of failure, your Lordships, recollecting that all trade is carried on subject to such casualties—that even the most profitable business is attended with subordinate outgoings, and that the clear advantages of every vocation are to be estimated between a comparison between the *profits* and the *losses*—will be of opinion that the pursuer might as well have stated the maintenance of his family and the prime cost of his ware in his account of casualties, as this minute catalogue of trivial accidents from which no trade carried on during seven years can be free.

"With respect to the payment of his father's debts, no voucher is produced; and however unwilling the objector may be to judge of him uncharitably, she can scarcely think that a few years could so much alter any one's character and conduct as to change so piously dutiful a son, so gratuitously liberal a paymaster, as this article represents him, into the man whom she has had to do with from beginning to end of her unfortunate connection with him." . . .

*N.B.*—The *italics* in these extracts are from the original, no doubt thus emphasised by the hand of the indignant advocate. (The insolvent afterwards committed suicide.)

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## A LITIGIOUS ISLAND—HOME RULE AS A CURE FOR LITIGATION.

DURING the last few years we have heard a good deal about Home Rule and a good deal also about village communities, East and West, and since the beginning of time we have heard a great deal

about the evils of litigation. At first sight there does not appear to be much connection between the subjects. They have, however, been brought all three together in an interesting article in a recent number of the *Fortnightly Review*, entitled "A Home Rule Experiment in Ceylon."

In 1856 Sir Henry Ward determined to resuscitate an old institution which had not long before perished,—the village council. "The experiment was watched with great interest, because, if the scheme were found practicable, and the members of the diverse races in Ceylon showed themselves capable of self-government, a way would be found out of the difficulty caused by daily-increasing litigation, to which the people seemed wholly given up, and which was fast choking the minor courts with work that could not be overtaken. To what a stupendous extent this proneness had developed amongst a people who, prior to the British occupation of Ceylon, had few or no courts to go to, may be inferred from the statement of the Inspector-General of Police (Mr. G. W. R. Campbell, some time subsequently acting Lieutenant-Governor of Penang), in his Police Administrative Report for 1869, where he points out that in the year under review nearly a thirteenth of the whole population was brought before the magistrates as accused persons; of these 168,000 persons only a tenth were convicted, and 112,367 were dismissed without trial. The District Judge of Colombo (Mr. T. Berwick), in a letter to the Colonial Secretary, advocating the establishment of village councils as the proper forum for the settlement of trivial disputes, points out that the full significance of Mr. Campbell's statement is not apparent until it is considered that the enormous array of litigiousness the latter instances is independent of the numbers thronging the civil courts." Mr. Berwick makes certain calculations as to the number of civil causes, which lead him to this startling result: "It will not be very wide of the mark if we infer that there is an annual attendance at the Courts approaching, and perhaps equal, to the whole population; certainly largely exceeding the adult population." If these statements are not exaggerated, the passion for litigation and for appearing in Court in one way or another, had reached a preposterous height, and there was certainly a necessity for something being done to relieve the overcrowded ordinary courts. One great point in favour of the proposal for reviving the village courts of arbitration was that, as the old village council had perished so late as 1843, "the remembrance of these simple means of obtaining justice was yet fresh in the minds of some of the inhabitants; the village elders told the rising generation of the good old times when crops did not suffer through justice having to be sought at the far-away town." It was not the establishment of a new institution that was proposed, it was the revival of an old one. As was said by one of the Government agents in a debate on the Gansabhawa or Village Council Ordinance:—

"At the time when the British power carried the last Kandian monarch from his throne into life-long exile, there existed throughout the Kandian realm a patriarchal system whereby the administration of each village community was entrusted to the natural leaders of that community. The village elders, with the village headman as their president, met from time to time at a convenient spot, where, surrounded by all who cared to see and hear and criticise their proceedings, they deliberated on affairs of common interest, adjusted civil disputes, and awarded punishment to ordinary offenders against person and property. Cases of serious crime, rare indeed in those happy days, were reserved for the consideration of the king himself. It is possible that but for the luckless rebellion in 1817 and 1818 the British Government might have recognised by legal enactment, at any rate might not have ignored, the competency of the Gansabhawa in the matters above mentioned."

"Early in October 1871," says the writer in the *Fortnightly Review*, "the draft of the Gansabhawa Ordinance was published in the *Ceylon Government Gazette*, and it was at once discovered that none of its provisions provided for the revival (if anywhere existing, or had existed) of communal ownership, or cultivation of land according to the views of the community. Ancient customs might, however, be enforced by the village council. What the Ordinance proposed to do was to place in the hands of the people a means for the easy and inexpensive settlement of disputes arising out of land occupancy or cultivation, for putting down criminal and other disorders, and uplifting the moral tone of the community by the establishment of schools and the like."

In its preamble the Ordinance, as finally amended, sets forth "that it is expedient to facilitate the administration of village communities, and to provide for the establishment of village tribunals, with a view to diminish the expense of litigation in petty cases, and to promote the speedy adjustment of such cases."

The Ordinance re-establishes first of all the Village Community and the Village Council. Then it re-establishes the Village Tribunal. "This institution, established concurrently with the Council of Elders for purely village purposes, has to do with the crime of the community, and therefore the first clause (clause 20 of the ordinance), dealing with this branch of the reform, provides for the appointment of a president, to be paid from the general revenue. The oath of allegiance and the judicial oath must be taken by this functionary, who is to have associated with him five (or a less number of) councillors." The qualification for a councillor is, that he shall be upwards of 25 years of age, that he shall be possessed of real property in his own right or that of his wife worth more than 200 rupees, and that he shall not have been convicted of theft, fraud, forgery, or any infamous crime, or have been dismissed the public service for misconduct. "Civil cases, where 'the debt, damage, or demand shall not exceed one hundred rupees,' and criminal cases, such as petty thefts, petty assaults, malicious injury to property, or cattle, trespass, and maintenance cases, shall be decided. Power, however, is given to the Queen's Advocate, or his deputy having jurisdiction over the subdivision, to stop the further hearing of a case, and send it to the Police Court.

by the Court of Requests. The first duty of the tribunal (according to clause 26) is 'by all lawful means to bring the litigant parties to an amicable settlement, and to abate, prevent, or remove, with their consent, the real cause of quarrel between them.' That failing, evidence may be taken, and the opinion of the councillors given, followed by that of the president. If a difference of opinion exists, the opinion of the president is taken as the decision, but a record is made of the other opinion expressed. A number of clauses providing for the issue of processes for apprehension of offenders follow, as also a statement that the fiscal's department (in civil cases, and also in criminal where fines have been imposed) shall enforce the payment of the same. To give effect to the desire expressed in the preamble for inexpensive and summary proceedings being taken, it is enacted (clause 30) that, 'The proceedings of these tribunals shall be conducted in the native language, and shall be summary, and free from the formalities of judicial proceedings, and it shall be the duty of such tribunals to do substantial justice in all questions coming before them, without regard to matters of form; and no advocate, proctor, agent, or other person (excepting husbands for their wives, guardians and curators for minors and wards, and agents doing business in the subdivision for absent principals) shall be permitted to appear on behalf of any party in any case, before such tribunals.' Reports of all cases are to be sent at regular intervals to the Government agent."

The proof of the pudding is in the eating of it. What has been the effect of the Ordinance? The writer of the article says that, "tried tentatively in the first instance, the Village Councils and Village Tribunals at once became an assured success, and now they are being established on every hand." As to their working he refers to the testimony of Government officials, as expressed in a recently published volume of Administrative Reports sent to Lord Carnarvon by Governor Gregory. Take the following as a specimen of the Government Agent's Reports:—

"The Village Tribunals in Mátalé North appear to be a decided success. The president is doing his work well, and takes an evident interest in improving his district.

"The following is a statement of work done during 1873:—

	Civil.	Criminal.
Cases pending from 1872 . . . .	5	Nil
Cases instituted . . . .	797	548
Cases decided during 1873 . . . .	412	339
Cases pending at the end of 1873 . . . .	390	209
Decisions appealed against . . . .	12	5
Decisions affirmed by me . . . .	6	1
Decisions reversed . . . .	1	Nil
Case sent back for further evidence . . . .	Nil	1

"The eight appeals as yet undecided are those in which petitions have been presented to me, but the cases have not been sent to me by the president of Village Tribunals.

"The Minor Courts (as a result) at Dambulla were abolished in September 1873."

From which tabular statement it would appear that there is still a little litigation left in this Island of the Blest.

Probably the best effects of the alteration will be found in the suppression of false charges, the native presidents having the advantage of "knowing the parties," and in the more speedy and satisfactory settlement of disputes about boundaries (to which the great majority of the land cases related), which, says the writer of the article, can be "more admirably settled by arbitration by residents on the spot than by any other means."

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### FRAUD AS A GROUND FOR RESCISSION OF A CONTRACT.

It is a well-established principle of the law of this country that fraud will render a contract voidable *ab initio*. This is a principle which is applied both at law and in equity, and it is immaterial whether the fraud is practised by one of the contracting parties upon the other, or by both the contracting parties upon third parties. *Fermor's case* (4 Co. 77) is an early authority upon the point. The utility of such a principle is too clear to need demonstration; without it all mercantile transactions would soon lose their present character, and acquire instead the reputation of sharp practice and cunning. Granting then the necessity of such a principle, there will be found the best of reasons for its introduction into the transactions carried on by means of agents. One of the latest, and at the same time one of the most instructive cases, upon this latter question will be found in the *Law Times Reports* for 19th June (32 L. T. Rep. N. S. 517), in *The Panama and South Pacific Telegraph Company (Limited) v. The Indiarubber, Gutta Percha, and Telegraph Works Company (Limited)*. This was an appeal from Vice-Chancellor Malins. A few weeks ago we discussed this case so far as the principle of its decision affected the performance of a contract. We now propose treating it more as a decision upon an interesting point in the law of agency. The facts of the case are extremely simple. The Panama Company entered into a contract with the Indiarubber Company, by the terms of which the former were allowed the option of having a telegraph cable made and laid down by the latter. The payment was to be made by instalments, beginning with the order, and continuing during the progress of the work, in accordance with the certificate of B., an agent of the Panama Company. An order was given and a first instalment of £40,000 paid to the defendants, together with £600 commission to B. Shortly after the payment, the plaintiffs discovered that a secret sub-contract existed between B. and the Indiarubber Company, by which contract B. was to lay the cable himself, and filed a

bill to set aside the original contract, and obtain repayment of the £40,600 paid by them to defendants and the engineer B. The Vice-Chancellor gave judgment in their favour, and his decision was upheld by the Lords Justices. "I take it, according to my view of the law, to be clear," says Lord Justice James, "that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, cognizable in this Court. . . . And I take it to be equally clear that the defrauded principal, if he comes in time, is entitled at his option to have the contract rescinded; or if he elects not to have it rescinded, to have such other adequate relief as the Court may see its way to give him." His Lordship then proceeded to consider the question of authority, and in the course of his examination of the case from this point of view, introduced some strong illustrations in proof of the assertion that the clearer a thing is the more difficult it is to find any express authority or any dictum in its favour—an assertion which it is easy enough to understand, though it is so framed as to be equally difficult to support. The obvious principle, however, upon which these illustrations rest, is that where anything in the nature of a fraud is committed, a court of equity will allow the suffering party to sever the connexion which has been made the means of committing the fraud. The principle is thus laid down: Where there is a case which in the contemplation of a court of equity is a case in which a principal is conspiring with the servant of the other principal to induce him to cheat his master in a matter of business, the latter is entitled to say, "I will have nothing more to do with the transaction."

Both the Lords Justices agreed as to the justice of the decision of the Court below in this case, but Lord Justice Mellish appeared indisposed to hold that the effect of fraud extended so far as the remarks of Lord Justice James indicated: "I am not quite certain that I go the full length, as stated by the Lord Justice (James), in thinking that because a person has been a party to a fraudulent contract of this kind, the mere fact of his having been guilty of such a fraudulent contract, even supposing that the full remedy for the fraud could be otherwise obtained, would entitle the party to say, 'because you acted fraudulently, therefore I will have nothing more to do with you, and I will not carry out my contract with you.' I am not aware of any authority that has gone to that extent." The remarks on this head, however, are merely *obiter dicta*, nor do they in any way affect the plaintiff; but they all support the principle that, wherever there is proof of fraud, the party affected by such fraud shall obtain full redress for that fraud. The question really before the Court was whether the defendants, by their conduct towards the engineer, did not make an essential and material difference in the performance of the contract; whether, in fact, they did not make it impossible for the plaintiffs to keep him as a disinterested engineer. A moment's consideration of the

duty of the engineer enables us to answer that question in the affirmative.

A suggestion made by the defendants' counsel, to the effect that had the plaintiffs been told of the sub-contract they would have acquiesced in it, opens up an important branch of the law of agency, namely, the duty of making full disclosures in cases like the present. Vice-Chancellor Malins held that that circumstance did not at all relieve the defendants from the consequences of not having made the disclosure, and thereby giving to the plaintiffs an opportunity of saying whether they would or would not allow their agent to hold a position in which his interest and his duty would conflict. The recent case of *Dunne v. English* (31 L. T. Rep. N. S. 75), is an authority to show that no concealment or contrivance shall enable one party to deprive another of his rights. Again, if one party to a contract has made any representation to the other, and the other on the faith of that representation has agreed to enter into the contract; but before the contract is entered into, the facts are materially altered to the knowledge of the party who made the representation, but not to that of the other party, and the former allows the latter to enter into the contract in the belief that the party continues to exist as represented, the contract will be void (*Traill v. Baring*, 33 L. J., C. 521). This, it will be seen, is a direct authority in favour of the plaintiffs, for all the circumstances enumerated as being sufficient to render the contract void are found in the *Panama, &c. Company v. The Indiarubber, &c. Company*. Of course it is quite conceivable that there may be cases of omission to communicate facts when no fraud will be inferred, but then the omission must be made *bonâ fide*, and without actual fraud (*Vane v. Cobbold*, 1 En. 798). Even supposing the plaintiffs in this suit could have learnt the truth respecting the sub-contract by making inquiry, this would not have availed to free the defendants from liability, for where there is any wilful concealment of facts, whereby a person has been induced to enter into a contract, he shall have his remedy, irrespective of any want of inquiry (*The Central Railway Company of Venezuela v. Kisch*, L. Rep. 2 H. L. 99). There are other cases in which the principle applicable to the present case is clearly indicated. In *Kemp v. Rose* (32 L. T. Rep. O. S. 51) it was agreed that the certificate of an architect was to be conclusive as to the price to be paid for altering a church, the plaintiff being the builder engaged. The plaintiff discovered that an arrangement had been made between the architect and the defendants, who were to pay for the alterations, that no more than a certain sum should be charged, and Vice-Chancellor Stuart decided that, inasmuch as this arrangement put the architect in an adverse position, his certificate should not bind the builder. The principle of this case was afterwards recognised in *Kimberley v. Deck*, by Lord Romilly (25 L. T. Rep. N. S. 439). These are but a few of the many instances which might be selected as indicative of the strict



supervision exercised by courts of equity in all cases where a fiduciary relation exists. That this is perfectly right in principle cannot be denied. Since fraud may show itself in numberless ways, it is well that the remedy is applicable to all its manifestations. The decision of the Lords Justices will be another authority, if another were wanting, to show that an agent must not allow his interest to conflict with his duty, that he must not attempt to assume incompatible characters. It will also be a warning to principals that they will not be allowed to make a material difference in the performance of a contract. And finally, it is equally important as showing how essential is the observance of the rule that requires the fullest disclosure of the facts when an agent in a fiduciary position has any dealings with his principal.—*Law Times*.

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### COMPARATIO LITERARUM.

THE other day a merchant was charged before Alderman Figgins, in London, with having forged certain words in a letter addressed to him by another merchant, and with having made a fraudulent use of them in an arbitration. M. Chabot, the eminent expert, was examined on the part of the prosecution. The usual evidence was given. There was a distinctiveness about the letter "m" in the alleged forged words which was observable in the defendant's writing, and which did not exist in the prosecutor's; there was a suspicious look in the tail of the letter "y;" *et cetera, et cetera*. The magistrate said the only evidence against the accused was the evidence of experts, and he refused to send the case to trial.

Considering the little value that has been placed upon proof by comparison of handwriting, one is astonished that so much ingenuity has been displayed in framing the rules as to the admissibility of such evidence,—what writings may be compared with those whose authenticity is disputed; who is to be allowed to give evidence, that is to say, what degree of knowledge of the genuine handwriting is required to enable a person's testimony to be admitted; what value, if any, is to be placed on the evidence of mere experts; and whether their evidence is admissible at all. There is a great discrepancy in the rules of different legal systems as to the admissibility of the evidence, but there is great unanimity in the opinion of the fallaciousness of the evidence. The story which Lord Eldon told of himself in giving judgment in the case of *Engleton v. Kingston*, 8 Ves. 473, affords a remarkable instance of the uncertainty of this class of testimony,—“A singular circumstance applicable to this point happened to me. A deed was tried at Westminster Hall, stated to have been executed under circumstances throwing a good deal of blot upon the persons who had obtained it. The solicitor, who was a very respectable man, said he

felt satisfaction that there were respectable witnesses. One was the town-clerk of Newcastle; and I was the other. I could undertake to a certainty that the signature was not mine; having never attested a deed in my life. He looked back to my pleadings; and was sure it was my signature; and if I had been dead would have sworn to it conscientiously."

The rules of English law observed till recently on the subject are curious. One rule prevailed in the Ecclesiastical Courts—the courts in which wills were proved; another prevailed in the Common Law Courts. In the Ecclesiastical Courts comparison of handwriting was admitted. In the Common Law Courts, evidence was allowed of persons who had seen the party write, or of persons who were familiar with the handwriting from the knowledge they had acquired of it, say in the course of correspondence; but the law did not until 1854 allow a witness actually to compare two writings in order to ascertain whether both were written by the same person. They allowed evidence derived from previous acquaintance with the writing, but not evidence derived from mere comparison of different specimens submitted to the witness (see *Doe v. Sucklemore*, 5 A. & E., 1st series, p. 703). Nay, papers, even authentic papers, could not be submitted even to a jury for the purpose of comparing with them the writing whose genuineness was disputed, unless they were in evidence for other purposes of the cause (*Doe v. Newton*, 5 A. & E., 1st series, 515). And further, the reason why the jury were allowed to make a comparison, even in the case when the documents were already in the cause, "appears to me," says Lord Denman in that case, "that the comparison is unavoidable. There being two documents in question in the cause, one of which is known to be in the handwriting of a party, the other alleged but denied to be so, no human power can prevent the jury from comparing them with a view to the question of genuineness; and therefore it is best for the Court to enter with the jury into that inquiry, and to do the best it can under circumstances which cannot be helped. The best rule is, that comparison of writings by the jury shall not be allowed in any case where it can be avoided."

The rule of law in the English Common Law Courts (or what were till recently the Common Law Courts) has been settled by statute. The Act 28 & 29 Victoria, cap. 18, sec. 8, permits the comparison by witnesses of the disputed writing with others proved to be genuine to the satisfaction of the judge at the trial.

In France, according to the statement of Coleridge, J., in *Doe v. Sucklemore* (*supra*), the rules of admissibility of evidence on this subject laid down by the *Code*, etc., *Procédure Civile*, were precise and peculiar. That law "defines not only the persons who are to make the comparison, sworn experts, three in number, appointed by the Court, as agreed on by the parties, but the writing to be submitted. The writing must be of a public nature, such as signatures

made before a notary or judge, etc., or papers signed in some public capacity; or, if of a private nature, they must be admitted in the cause by the party to whom they are attributed to be of his own handwriting; a previous admission of them, or previous proof, will not make them admissible."

In the United States different rules prevail in different States. "In *Bennett v. Matthews*, 7 Chicago Leg. News, 235 (says the *Albany Law Journal*), the Supreme Court of South Carolina considered the proof of handwriting by comparison. It was held to be the rule in South Carolina that comparison of handwriting as a means of ascertaining the genuineness of the handwriting in question can only be permitted in aid of doubtful proof. It cannot be resorted to as an original means of ascertaining the genuineness. (*Bird v. Miller*, 1 McM. L. 125; *Bowen v. Plunkett*, 2 McC. 518.) Comparison of handwritings irrelevant to the record, to ascertain the genuineness of the handwriting in question, is permitted in Massachusetts, Maine, Connecticut, Ohio and Vermont. In New York, New Hampshire, Virginia, New Jersey, and some other States, this evidence is excluded." The "comparison of handwriting" referred to here appears to be "comparison" in the more restricted sense.

In Scotland we have had no difficulty about the character or nature of the writings to be submitted for comparison. Of course they must be proved, or admitted, to be genuine. But it is not necessary that they should be relevant to the record. Nor is it necessary that they should be of a public character. Indeed it is hardly rational to enact that you shall not be allowed to test a writing of a private character except by comparing it with one of a public character. Many people have an offhand ordinary handwriting, and what may be called a state or official hand.

But in Scotland we have a great distrust of mere experts—and justly. Like mad doctors, they support the side on which they are engaged. Also, they found too much on very minute circumstances of similarity or dissimilarity. We remember of one case in which a bank-clerk, familiar with the handwriting of the person the genuineness of whose alleged signature was in dispute, swore very positively that the signature was a forgery. Unfortunately he stated his reasons; one of the principal was that there was a loop in the letter "l" of the signature; which never occurred in any genuine signature. He was shown a document in process which was admitted to be genuine. "Is there a loop in the letter 'l' there?"—"Well, yes." "The same as in the disputed signature?"—"Yes." So this evidence did not go for much. Ordinarily the man did not loop his "l's"; occasionally he did. There was no loop in the letter "l" in any of the signatures in possession of the alleged forger, which the forger must have copied from if there was a forgery. But there was this peculiarity in a signature admittedly genuine, which the alleged forger had never seen.

Some of our judges have gone so far as to reject the evidence,

not only of engravers and other mere experts, but also of persons who had a previous acquaintance of the handwriting. In a case at Ayr Circuit, Oct. 6, 1860 (3 Irvine 625), where the charge was of having forged a bill, the Crown prosecutor called as a witness an officer of the bank, who had never seen the person whose name was alleged to be forged write or sign his name, but whose knowledge was merely from having previously seen cheques and bills signed with the person's name. Lord Deas disallowed the evidence. "The proposed evidence," said his Lordship, "*like that of an engraver*, was merely that of opinion. Such evidence had been found of no use, for as many opinions could always be obtained on the one side as the other. Evidence of people who had frequently seen the man write would have been received. Evidence to be had merely *comparatiōe literarum* was not much to be depended upon, because a man's signature may vary very much, according to the peculiar circumstances attending their respective subscription. Two signatures might be very dissimilar and yet both be genuine." The jury were, however, allowed to look at the documents and judge for themselves.

In the case of *Arnot v. Burt*, decided in the Second Division, Nov. 14, 1872 (11 Macph. 62), the Lord Ordinary (Gifford) refused to receive the evidence of mere experts who had no previous acquaintance with the handwriting. When the case came to the Inner House, a suggestion was made to have the ruling reversed, and to allow such evidence to be taken then. The Court, while declining actually to hold that such evidence was incompetent, stated that it would not have the slightest effect on their minds, and it was for the parties to consider whether it was worth while to incur useless expense. It might be urged that evidence which is to have no effect and which will only encumber the case ought to be rejected peremptorily. On this matter the Lord Justice-Clerk (Lord Moncreiff) made these remarks:—

"The main evidence on the question of forgery is from the comparison of handwriting—a kind of evidence which often leads to fallacious results. During the debate something was said about experts. I think that a person acquainted with the particular handwriting of the party, or even an ordinary person unacquainted with it, is as likely to ascertain the truth of the matter as those witnesses who, looking at it from a scientific point of view, are apt frequently to exaggerate small distinctions. Such witnesses are in a different position from men of skill in such matters as chemical and mechanical facts, which are not known to ordinary observers. In a question of the mere identity of handwriting we ourselves are quite able to judge."

In the recent case of *Pollok v. Burns*, March 3, 1875 (2 Rettie, 497), in which one of the allegations made by the suspenders of a charge on a bill was that the signature was a forgery, Lord Gifford remarked: "The evidence as to handwriting is unsatisfactory. I

do not attach much importance to the absence of the evidence of experts, for such evidence is more of the nature of argument than of proof. All they can do is merely to point out resemblances or differences in the disputed signature as compared with genuine specimens of handwriting. They afford valuable assistance to the Court, just as counsel do, but this Court must itself judge *comparatione literarum*."

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### LEGAL EPIGRAMS.

WE had supposed that this subject was exhausted some years ago in this Journal, under the title of "Law and Lawyers in Literature," but recent reading indicates that "there are a few more left of the same sort," as the famous razor-strop man was wont to say of his wares. Some of these omitted examples are among the very best. The following is by James Smith, one of the two brothers, authors of the famous "Rejected Addresses," and is entitled "Westminster Bridge":—

"As late the Trades' Unions, by way of a show,  
O'er Westminster Bridge strutted five in a row,  
'I feel for the bridge,' whispered Dick, with a shiver,  
Thus tried by the mob, it may sink in the river.'  
Quoth Tom, a crown lawyer, 'Abandon your fears;  
As a bridge it can only be tried by its piers,'"

The following is by the same author:—

"'What with briefs, and attending the court, self and clerk,  
'I'm at my wits' end,' muttered Drone, the attorney;  
'I fear 'tis a serious case,' answered Shark—  
'You're so terribly tired by so little a journey.'"

Several of the best legal epigrams were written by Sir George Rose. His verses on Lord Eldon's habit of "doubting" are familiar. The following on the same subject, taken from the *Morning Chronicle* newspaper, should have found a place in our recent sketch of Eldon, as being less well known:—

"The Chancellor, so says Lord Coke,  
His title from *cancello* took;  
And every cause before him tried,  
It was his duty to decide.  
Lord Eldon, hesitating ever,  
Takes it from *chanceler*, to waver,  
And thinks as this may bear him out,  
His bounden duty is to doubt."

The following, by Sir George Rose, "On Samuel Warren, Esq., Q.C., and Recorder of Hull, Author of 'Ten Thousand a Year,' 'Now and Then,' etc.," was designed and received in good part:—

"Warren, though able, yet vainest of men,  
 Could he guide with discretion his tongue and his pen,  
 His course would be clear for 'Ten Thousand a Year,'  
 But limited else to a brief 'Now and Then.'"

It is suspected that there is more truth than poetry in the latter half of the first line, but authors in reading criticisms on themselves, like children when eating cake, only pick out the plums.

The next is by Samuel Bishop:—

"In indenture or deed,  
 Tho' a thousand you read,  
 Neither comma nor colon you'll ken;  
 A stop intervening  
 Might determine the meaning,  
 And what would the lawyers do then?  
 Chance for change of construction gives chance for new flaws;  
 When the sense is once fixed, there's an end of the cause."

A prettier compliment to a lady has rarely been paid than the following impromptu by Lord Erskine, "on seeing one of the Croydon Belles in the court at Kingston, during the assizes:—

"Whilst petty offences and felonies smart,  
 Is there no jurisdiction for stealing a heart?  
 You, my fair one, will cry 'Law and Court I defy you!'  
 Concluding no *peers* can be summoned to try you.  
 But think not, fair Shorey, this plea will secure you,  
 Since the Muses and Graces will just make a jury."

Some one versified a joke of Jekyll's as follows:—

"Serjeant Raine was one day  
 The counsel for Hay,  
 In a cause that for Appleby stood.  
 Quoth Jekyll the wit,  
 'I have never heard yet  
 Of the rain that did hay any good.'"

The following was an impromptu made during the trial of an action for damages for falling into a hole in a public street in a neighbouring city, the defence being that the plaintiff was intoxicated. The author is unknown—at least to fame:—

"The plaintiff fell into a pit,  
 As the state of one tipsy befitted;  
 Though he cannot recover a bit,  
 He's entitled at least to be pit-ied."

The following, from *Punch*, concerns Lord Brougham, of whom some great rival said, if he only knew a little law he would know a little of everything:—

"'I wonder if Brougham thinks as much as he talks,'  
 Said a punster perusing a trial;  
 'I vow since his lordship was made Baron Vaux,  
 He's been *vox et præterea nihil*.'"

From the same source we glean the following, entitled, "Dividing the Woolsack :"—

" 'This Edmunds case,' said Westbury,  
Sarcastic, smooth, and cool,  
'Will prove a case of ample cry,  
But very little wool.'  
Quoth Chelmsford, as on Westbury  
He turned a scornful back,  
'Though we perhaps don't get the wool,  
You ought to get the sack.'"

The next, we guess, must have come from the Greek :—

"When Judge D——s writes a letter,  
His rhetoric is clear and strong ;  
But on the bench it might be better,—  
His *sentences* are much too long."

"The Bar, with Sketches of Eminent Judges, Barristers, etc., etc., a Poem with Notes," is the title of a 12mo volume of 150 pages of ten-syllable verse, published in London in 1826. The author's name does not appear, nor have we been able to learn it. Perhaps our English brethren can give us the information. The book is a very clever production, full of wit, sense, and discriminating criticism. Most of the sketches are somewhat elaborate, but occasionally the author condenses his judgments into a form quite epigrammatic. Of Saunders, the reporter, who was a most forbidden sloven, he says :—

"Lo ! while he speaks, in groups they throng as near  
As their disturbed olfactory nerves can bear,  
To the rare precious things his mouth discloses,  
Opening their ears and stopping all their noses !  
And gathering seeds of knowledge from his tongue,  
As hungry sparrows pick up grain from dung !"

He draws the following contrast between Curran and Phillips :—

"But what a difference ! heaven and earth ! the one  
A royal eagle soaring to the sun,  
Steady and strong and daring in his flight,  
Piercing with stedfast eye the realms of light ;  
Or cleaving through the air his rapid way,  
And darting swift as lightning on his prey !  
Lord of the air, around, below, above—  
In every motion still the bird of Jove.  
The other a keen hawk, that, when he flies,  
Skimming the fields, or mounting to the skies,  
Flutters his wings aloft—then comes down souse,  
Pouncing upon a sparrow or a mouse.  
The one a comet, with disastrous glare,  
Gleaming portentous through the troubled air,  
Starting whole nations with its awful light—  
The other a mere school-boy's paper kite,  
Borne fluttering forward on the eddying gale,  
With a brave blazing lantern at its tail."

Of Hale he gives this severe judgment, which is more just than the faultless character attributed to him by tradition:—

“So framed, he wasted oft his precious nights,  
With fawning fools, and selfish parasites;  
Delighted with a dainty snug repast,  
And fond of praise and flattery to the last!  
Thus, ignorant though learned, and weak though wise,  
He viewed things often with distorted eyes,  
And truth or error, right or wrong, surveyed,  
As reason ruled, or superstition swayed;  
Now shining forth without a fleck or flaw,  
A luminous expounder of the law,  
In wisdom's vast and various treasures rich,—  
Now—hanging an old woman for a witch!”

We shall be glad to look into “The Bar” again.

*Albany Law Journal.*

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#### REMARKS ON RECENT CASES.

*Patent—Right of Crown.*—In *Feather v. Queen* (35 Law J. Rep. Q. B. 200), it was held that letters patent do not preclude the Crown from the use of the invention protected by the patent, that the monopoly granted by the Crown in favour of the patentee does not operate against the Crown itself, the granter of the monopoly. The Court held themselves bound by the doctrine established by ancient documents and the best authority, that in construing grants from the Crown, a different rule of construction prevails from that which prevails in construing grants from one subject to another. As was said by Lord Stowell, “All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants, and upon this just ground, that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes and for the public use, it shall not be intended that such prerogatives, rights, and emoluments are diminished by any grant beyond what such grant by necessary and unavoidable construction shall take away” (*The Rebeckah*, 1 Ch. Rob. 227). The general principle thus stated was illustrated by the case of tolls; however general and universal by the terms of the grant the toll may be against the rest of mankind, the Crown is nevertheless exempt from toll. In the case of patents it was observed in *Feather v. Queen*, there was the strong ground of public policy in favour of preserving the Crown's privilege. “According to the Statute of James, the power of the Crown to grant the right of monopoly in the case of inventions is not to be exercised where public inconvenience would ensue. Now a patentee, having the sole right to the use of



his invention, is not bound to permit any one else to use it; so that if the Crown were subject to the general restriction, the State might be deprived of the use of an article essential to the public service—possibly for the defence of the realm—while a foreign power, perhaps an enemy, would have full opportunity to profit by the invention," *per* Cockburn, C.J. It may be quite right that a patentee should not have the power of totally and absolutely prohibiting the use of his invention in the service of his own state; but it does not follow that the Crown should have right to use the invention, the perfecting of which has cost much trouble and much expense, without making any compensation for the use. Accordingly, in the Lord Chancellor's Patent Bill, introduced, but not carried, last session, it was provided that a patent should have the same effect against the Crown as it has against a subject; but that the administrators of any department of the service of the Crown might by themselves, their agents, contractors, or others, use the invention for the service of the Crown on terms to be agreed upon between these administrators and the patentee, or in default of such agreement, settled by the Treasury.

In *Dixon v. London Small Arms Co. (Limited)* (44 Law J. Rep., Q. B. 63), an attempt was made to extend the principle of the Crown's right a stage further, so as to give to persons contracting with the Crown the same right as the Crown had of using the patented invention in the manufacture of the articles with which they had contracted to supply the Crown. But the pretension was repudiated by the Court. The plaintiff had patented an invention in the manufacture of rifles, the defendants undertook to supply the Government with a quantity of rifles, and they made use of the plaintiff's invention without his leave, and without offering to pay any royalty. The plaintiff did not like this, and brought an action for infringement of his patent. The Court held that the right of the Crown, declared in *Feather v. Queen*, was in such a case as this a matter of no moment; there was here no question between the Crown and a subject; it was a question between subject and subject. It was said that the Crown had a right to use this patent, and that the contractors were really acting for the Crown. But the answer was that the alleged infringers were not in this transaction acting for the Crown, they were acting for themselves; they were not the servants of the Crown employed in the manufacture of rifles; they were merchants selling their rifles, they were independent of the Crown, and might enter into the contract or not as they pleased. If the contractors were allowed the same right as the Crown had, then it would come to this:—if a manufacturer obtained a license from the patentee to use his invention under obligation of paying a royalty on the articles manufactured, and he accordingly manufactured a quantity of these articles, not specially for the use of the Crown, but in the ordinary course of business, for the use of any one who chose to purchase them, the obligation to

pay a royalty would hold in the event of a private person happening to purchase them, but the manufacturer would be liberated from the conditions of his license if he happened to sell them to the Crown. As for the argument of public policy, the Court thought that it had no weight in the case. The power of a patentee to absolutely prohibit the Government of his country from using his invention in the service of the State is not raised up by protecting him in the control of the use of his invention in a question with private persons.

*Carriers as Warehousemen.*—The decision in the case of *Mitchell v. Lancashire and Yorkshire Railway Company* (44 Law J. Rep., Q. B. 107), shows, as we read it, the reluctance of judges to give effect to conditions made by public companies, who have a monopoly of the carrying trade, so much in their own favour as entirely to exclude liability. The defendants in this case sent goods by their railway to the plaintiffs. On the 26th July the defendant sent an advice-note stating that the goods had arrived, and that they would be "held by the company, not as common carriers, but as warehousemen, at owner's sole risk." An additional charge was made for the time during which the goods were warehoused. The plaintiffs did not remove the goods until October, by which time the goods had suffered damage through the negligence of the defenders. On an action being raised by the owners of the goods, the Court of Queen's Bench held that the railway company was responsible. Although the responsibility of the railway company as carriers, and therefore their responsibility as insurers, ceased when they intimated the arrival of the goods and the cessation of their character as carriers, their character as bailees still remained, and the company incurred liability as bailees for reward.

That a railway company or other carrier should be entitled to charge when they cease to act as carriers and act as warehousemen, and that they should as warehousemen have a lien on property left in their charge when they act as warehousemen, are propositions to which we think no exception can be taken (although in *Great Northern Railway Company v. Swaffield* (43 L. J. Rep., Ex., 89), the latter statement was doubted greatly by Baron Pollok), and that in the ordinary case the company, when it acts as warehousemen and charges for warehousing, should be free from all liability simply because it has just ceased to act in the more onerous capacity of carrier, is a proposition which is quite ridiculous. But it appears to us that the real question in the case under notice was, what was the bargain between the parties, and that depends on the construction to be put on the condition in the notice sent by the company to the consignee, which condition, whatever it was, the consignee acquiesced in. The condition was that the goods were "held by the company, not as common carriers, but as warehousemen, at owner's sole risk." Mr. Justice Blackburn, who gave the leading judgment, said, "It seems to me unreasonable to construe

these terms as meaning that the defendants should hold the goods with the benefit of receiving rent for warehousing them, but without any liability whatever, and except that they must not convert or sell or steal them, they need not take any care about them. The stipulation is to be construed against the company who make it, and I do not think that the defendants have none of the liability of warehousemen. I think the words mean that the defendants would hold as warehousemen, and no longer as carriers with a liability (with the exception of one or two excepted perils), as absolute insurers." Mr. Justice Field said the words *at owner's sole risk* "create a difficulty, for I confess I do not at present see what that expression provides for."

If the statement that the goods were held by the company, not as common carriers, but as warehousemen, at owner's sole risk, simply meant that the company now acted as warehousemen, and were free from liability as carriers, it was quite unnecessary to add the words "at owner's sole risk." But the words were inserted in the condition, and some meaning must have been attached to them by those who made the condition, and by those who accepted it. The only meaning which can be attached to the words "at owner's sole risk," is that the goods were at the sole risk of the owners. However, it is very satisfactory to find that the Courts refuse to construe conditions in their natural, and indeed their only sense, when these are made, not indeed in contravention of an Act of Parliament, but contrary to public policy, in an unreasonable spirit and in an unfair exercise of the power which the monopoly given to public carriers confers upon them. The only difficulty is whether one should apply that spirit in a case where the company is not acting in its public function as a carrier, but in a character which is an occasional incident of that, and grows out of it. The Court seems to have thought, although it certainly did not say, that something of the more than ordinarily onerous liability imposed upon carriers remained after a new character was taken up, and to which the defendants would not have been subjected if they had acted simply as warehousemen from the first. It may be right that carriers should keep the goods stored for such a time as must elapse before they can be removed and have the liability of carriers during that time; but if they are called upon to keep them an unreasonable time, it seems hard that they should have any liability greater than ordinary warehousemen.

*Felony of Carriers' Servants.*—The 8th section of the Carriers' Act excepts from the protection afforded to carriers by the leading sections of the Act, the case of liability arising from the felonious acts of the carriers' servants. In two recent cases, one in the Court of Session and one in the Court of Queen's Bench, the question was considered, what amount of evidence is sufficient to show that the loss occurred through the felonious acts of the carrier's servant, or rather what amount of evidence is required to throw on

the carrier, the burden of proof that the loss did not occur through the cause stated. In both cases the question received the same answer, and apparently in both, and certainly in one, the consideration of this question, which in the circumstances was itself simple enough, was complicated by the opinion given in a previous case, the unsuccessful party having founded upon that opinion, without taking into account the circumstances in which the opinion was pronounced. In the Court of Session case *Campbell v. North British Railway Company* (2 Rettie, 433), the goods were despatched from Perth and arrived two days after at Leeds. On arrival it was found that some of the goods had been abstracted; there was no evidence by whom. In the case of *M'Queen v. Great Western Railway Company* (44 L. J. Rep., Q. B. 131), the goods were delivered to the railway company at Cardiff, and, after lying in a truck at a part of the station there to which the public had access, were forwarded, or supposed to be forwarded, to Paddington, on arrival at which station it was discovered that the goods had been abstracted; there was no evidence by whom. In both cases it was urged that there was a greater probability that the company's servants had committed the theft than that any other person had. The answer was obvious. The only ground for inferring this greater probability is that these servants have greater opportunity than other people, but then that is so in all cases. "That which is common to all cases cannot be the distinction between them," said Lord Ardmillan. And if the greater probability of the company's servants having committed the theft, arising from the greater opportunity which they have of doing so, were of itself sufficient to infer liability on the part of the company, then the protection afforded by the leading sections of the Act would be done away with in all but very exceptional cases.

In such cases, where the evidence must often be very narrow, the question of liability depends upon the *onus* of proof. In *Boyce v. Chapmans* (2 Bingham, N.C. 222), slight evidence was given that the servant had stolen the goods; the jury gave a verdict against the carrier; a motion being made for a new trial, it was refused on the ground that the servant should have been called as a witness. In *Vaughton v. London and North-Western Railway Company* (43 Law J. Rep. N.S., Exch. 75), the circumstance that the defenders did not call their servants as witnesses was greatly founded on by the Court in determining against the company. In that case Baron Pigott said, "In the present case I think the evidence given was more consistent with the guilt of the defendants' servants than with that of any person not in their employment, *for the defendants' servants had greater opportunities than others*. That being so, there was a case for the jury, the *onus* of answering which was upon the defendants. They might have answered it by calling the servants towards whom suspicion was directed, but they determined not to call witnesses. They preferred to leave the matter unexplained."

The reason assigned by Baron Pigott for holding that there was a greater probability was rejected in both the cases which we are noticing. But the statement ought to be regarded in the light of the circumstances of the case in which the opinion was given. In that case (as Justice Quain pointed out in *M'Queen's case*) two of the company's servants were distinctly charged with special acts; the carter who signed for three parcels only produced two, and another servant was found in possession of part of the missing goods. Neither servant was called as a witness; and the circumstance of their not being called was founded on, and deservedly founded on, by the jury and by the Court.

The result of these cases is this, that when a consignor, wishing to take advantage of the 8th section of the Carriers' Act, desires to show that the loss has arisen from the felonious acts of the carriers' servants, although it is not necessary to fasten the blame on any particular servant, it is necessary to establish a *prima facie* case that the loss has arisen from such felonious acts, but the single circumstance that the servants have a greater opportunity than others, not servants, of committing the theft, from the greater opportunity they have of doing so, does not establish a *prima facie* case. If it did, then the *onus* imposed on the carrier of calling his servants to disprove the charge might have the effect, as in the two cases referred to, of compelling the railway companies to call all their servants employed between Perth and Leeds and between Cardiff and Paddington. There is no accommodation in our Courts at present for such a great cloud of witnesses.

In the cases we have mentioned, the carriers were railway companies. The same result would not follow in the case of parties who were carriers and nothing more. The probability that a carrier's servant is the thief is great in any case, but it is not so great in the case of a railway company, which conveys passengers as well as goods, and whose stations are necessarily open to the public.

*Collaborateur*.—It has been settled that a person voluntarily assisting the servants of a master cannot stand in a better position than those with whom he associates himself, so far as regards the liability of the master. *Degg v. Midland Railway Co.*, H. & N. 773, is the most frequently quoted authority on this point. But cases may be supposed, and in point of fact often occur, where persons who are not actually bound to assist do assist, without making themselves *quasi* servants and reducing themselves to the position of *collaborateurs*, if injury should be suffered by them through the fault of the ordinary servants. The case of *Wright v. London and North-Western Railway Co.* (L. R. 10, Q. B. 298; 44 L. J. Rep., Q. B. 119; 32 Law Times Rep., 599), is one of these. The plaintiff sent a heifer to a station of the railway company. On arrival he assisted to shunt the carriage in which the animal was, and in doing so was injured by the fault of the railway com-

pany's servants. There was some evidence on which the jury might go that their assistance was given with the consent of the station-master, and that it was the usual course, when cattle arrived at this station, that the person in charge should assist in the delivery. The railway company was held liable. The Court distinguished the case from that of *Degg*, in respect that the plaintiff was not a mere volunteer. Cockburn, C.J., said it must be taken that what was done by the plaintiff was done by the consent of the station-master, and that being so, he was not in the position of a volunteer or *quasi* servant, so as to be bound to take upon himself all the risks of the employment in which he was engaged. And Field, J., said, "The station-master is agent of the company to deliver goods, and if he assented to some other mode of delivery than the usual one, he would bind the company thereby." In the Scotch case of *Wyllie v. Caledonian Railway Company*, Jan. 27, 1871 (9 M. P. 463), the circumstances were much alike, but the ground of decision stated was not the same, and it was a sounder one. In the latter case, the servant of the owner of the cattle was assisting to place the cattle in the trucks when he was injured through the fault of the railway company's servants. The company was held liable, and the reason stated was that he was acting not in the service of the company, but in his master's service. In *Wright's* case, the true reason of liability appears to be that the plaintiff was acting in his own service, and could not therefore be called a *collaborateur* of the company's servants. If the station-master had forbidden him to act, that would have been a different matter. But the circumstance of the station-master not objecting to the assistance of the volunteer is surely not a matter of any importance, after the case of *Wilson v. Merry and Cuninghame*, in which it was held that the subordinate superior, the managing man, was a fellow-servant of the workman whom he commanded.

*Ballot Act.*—Several cases under the Ballot Act have not long since been decided by the Court of Common Pleas. The most recent of these is the case of *Woodward v. Sarsons* (32 Law Times Reports, C. P. 868), and it is of all the recent cases the one of the greatest practical importance to electors and candidates, for it relates to the proper mode of marking the ballot papers, and what deviations from the ordinary form are fatal to the vote. It is a case of special interest to Scottish lawyers, because, on two points which were decided in the well-known *Wigtown Burghs* case, it brings the English Courts into direct conflict with the Scottish Courts, and establishes a different law in the two countries. In the *Wigtown* case, it was held by the Court (Lord Benholme dissenting) that a double cross, or an addition of a line to the cross, or marking the cross on the left instead of the right-hand side of the candidate's name, vitiated the vote. The Court of Common Pleas have given an opposite decision. The ground on which the majority of the judges in the Scottish Courts appear to have gone was, that there was a

departure from the mode of marking the paper prescribed in the "Directions for the Guidance of Voters," which afforded means of identifying the votes. But, somewhat inconsistently with this, votes were accepted where additions were made to the feet of the cross, so as to make it like the letter X—a deviation by which a voter might be identified just as much as by the addition of a line. In the judgment there was a good deal of consideration as to what amount of irregularity would vitiate a vote; but little was said about the question what parts of the Act are directory, and what are imperative, the first question to be considered, and on the answer to which the whole matter turns. This question was thrust into the background. The English judges have held that it is only in the "Directions for the Guidance of Voters" that there is a direction to put a cross on the right hand side, that these directions are merely directory, not imperative, and consequently, that a double cross, or a cross and a line, or a cross on the wrong side, cannot vitiate the vote, unless, indeed, proof were given that by such marking the votes could be identified. "There can be no doubt," said Coleridge, C.J., who delivered the written judgment of the Court (Coleridge, C.J., Brett, Archibald, and Denman, JJ.), "as to the intention to vote, and no doubt as to the intention to vote emphatically for one candidate. If there were evidence of an arrangement that the voters should place two marks so as to indicate that it was he, that voter, who had used that ballot paper, then, by reason of such evidence, such double mark would be a mark by which the voter could be identified, and then the papers, upon such proof being given, should be rejected. But the mere fact of there being two single crosses is not in our judgment a substantial breach of the statute."

Sir Charles Dilke, during last session of Parliament, desired to have a commission or committee to inquire into the defects of the Ballot Act. He was put off on the ground that in the course of the election petitions there would be judicial interpretations of the doubtful parts of the Act. We have got at last two judicial interpretations of the part of the Act of greatest everyday importance, and the decisions are contradictory. Surely next session a short Act will be passed to declare the law, and make it the same in Scotland and in England.

Several other instances of peculiarity in the marking of ballot papers occurred in this case. The Court disallowed, as clearly bad, a paper on which the voter's name was written, and with some hesitation a paper on which the candidate's name was written. The Court yielded "to the suggested rule that the writing by the voters of the name of the candidate may give too much facility, by reason of the handwriting, to identify the voter." The Court allowed a vote marked with a single line, "because, as the ballot paper was handed in by the voter, the mark substantially indicated that the voter intended to vote for the candidate against whose

name it was placed," in which decision they differed from the whole of the judges in the *Wigtown* case. In the *Wigtown* case Lord Benholme remarked that in such a case the voter failed to declare his choice, the act of voting not being completed. The Court of Common Pleas also allowed ballot papers marked with three crosses, marked with a star instead of a cross, and one where the letter P was added to the cross. The latter decision being evidently on the ground, that although the name of a candidate written on the paper might afford evidence of handwriting, a single letter did not afford sufficient material for such identification. From the report of this case it appears that another ballot paper was rejected because the letters "C N" were placed after the cross. Surely this is drawing the line very fine. One capital letter does not afford means of identification. Two capital letters do. All along we have thought that the Court of Session took too strict a view of the requirements of the Act. But the Court of Common Pleas seems to be erring on the other side.

Some parts of this English decision are, we think, open to question. The same remark applies to some of the reasons given. For example, it is said by Lord Coleridge, that the only part of the Act which is imperative is the first part (that which contains the sections). The rules in Schedule I. are only directory. Now, we can understand that what are called directions for the guidance of voters are directory. If directions are not directory one does not very well know what are so. But we doubt very much whether there are not some of the many rules just as imperative as the sections are. Further, his Lordship says that all that is absolute in the Act is that the vote shall be given in secret. If this is done, that is enough; but this must be done; and apparently he thinks the vote would be void if not given in secret. It is quite true that in the 2nd section of the Act it is said that "the voter having secretly marked his vote on the paper, and folded it up, so as to conceal his vote, shall place it in an enclosed box." But there is no penalty for not marking the vote in secret, and no sanction of nullity in the case of a vote not marked in secret; although there are penalties for many other acts, and the sanction of nullity is imposed in several cases of irregularly marked papers.

Another irregularity which presiding officers have a mysterious fancy for committing was the subject of decision in this case. The presiding officer had marked the voter's number on the register on the face of the ballot paper instead of on the counterfoil. He did so with 294 ballot papers. They were all rejected.

The election was not overturned, because it had really been conducted according to the principles of the Act, and although both candidates had suffered, the result would have been the same; supposing no bungling had been committed and no votes spoiled.

In Scotland we have never had any doubt of the right of a candidate in an election under the Ballot Act to be present in a



polling station or at the counting of the votes, not merely when he happens to be acting as agent or assisting his agent, but simply in his character as candidate. Rule 51 seems to make the matter beyond doubt. In the case of *Clementson v. Mason*, 44 Law Journal Rep. (C. P.) 171, the question was tried, and a very lengthy judgment was given by Mr. Justice Brett in favour of the view on which we have in Scotland always acted. The learned judge pointed out considerations to be found in the Act in favour of the idea that the candidate had not right, as such, to be present. The object of the Act is to promote secrecy of voting, and a declaration of secrecy is required from presiding officers, agents, etc., but not from candidates; a not unfair inference from which is that their presence was not contemplated. The leading clauses of section 4, prohibiting violation of secrecy by those present officially, and not as voters, at the polling stations, and at counting of the votes, are directed against officers, clerks and agents, not against candidates. Then section 11, which provides a penalty for wilful misfeasance, or wilful act or omission, is directed against returning officers, presiding officers, and clerks, but not against candidates. But the strongest provisions in the Act in favour of the exclusion of candidates are those in Rule 21, which says that the presiding officer shall exclude from the polling station all persons "except the clerks, the agents of the candidates, and the constables on duty;" and Rule 33, which says that "the returning officer, his assistants, and clerks, and the agents of the candidates, and no other person, except with the sanction of the returning officer, may be present at the counting of the votes." So far everything seems to be against the right of the candidate to be present at any of the proceedings, except indeed at the nomination; and in that case there are express words providing for that. But then we come to Rule 51, which deals expressly with the candidate's right to be present:—"A candidate may himself undertake the duties which any agent of his, if appointed, might have undertaken, or may assist his agent in the performance of such duties, and may be present at any place at which his agent may in pursuance of this Act attend." In certain circumstances then, at least, the candidate may be present, so that the total exclusion provided by Rules 21 and 33 cannot hold. But is the presence only allowable when the candidate undertakes the duty of agent, or assists the agent? The third part of Rule 51, "and may be present," etc., must express a general right; it cannot be held as being meant to express a right existing in the case of his assisting his agent in the performance of the agent's duties, one of which is to be present in the polling station, for the third part would then be pure tautology, as a candidate cannot assist without being present, and although the "undertaking" the duties of an agent may in one sense of the term not imply presence, because a person may fail to do what he has undertaken, yet "the third part, if it is to be read with one of the former parts, must, according to

the ordinary rules of grammar, be read along with the other," and we have seen that it cannot.

We doubt very much if the word "undertake" in Rule 51 has the very limited meaning suggested.

"Although (says Brett, J.) there are strong grounds to be collected from the consideration of other parts of the statute and its schedules for suspecting that the intention was only to give a limited right to the candidate of being present as such at the polling stations, and at the place for counting the votes, still there is nothing to make it sufficiently certain that the words ought not to be construed according to their ordinary and grammatical signification; and then they signify that the candidate may as such be present at any polling station and at the place of counting the votes. The word 'candidates' is the word which must be read into the exceptions in Rules 21 and 33. Nothing must be read into this rule 51."

It strikes us that this is scarcely the proper way to put it. Rules 21 and 33 are repugnant to Rule 51; but the latter happens to be the last, and there is authority for saying that in a case of repugnancy between different sections of a statute the last must rule.

Mr. Justice Denman gave a direction at the trial (it was a trial for assault raised by the candidate against the presiding officer for illegally causing him to be ejected from the polling station) against the candidate's right to be present. He altered his view when the question was discussed before the Common Pleas.

*Restraint of Marriage.*—There was a good deal of discussion on this subject in a case decided in the Second Division of the Court of Session last summer session. The distinction in this subject—what conditions are or are not void—are rather fine in all countries, and, as is to be expected, the English law does not here depart from its traditional character. In the case of *Bellairs v. Bellairs*, decided last year, Sir George Jessel, the Master of the Rolls, explained the state of the law: A general prohibition of marriage is void as a condition defeating a gift of purely *personal* estate: a rule which does not apply to land and charges on land. In *Bellairs'* case the fund was mixed, and in accordance with a general principle, it was held that the rule as to personalty governed the case.

In *Allan v. Jackson*, 44 Law J. Rep. (Ch.) 337, the question for consideration was, whether a condition that a gift to a married man should go over to other parties in the event of his marrying a second time was an operative condition. The Court held that it was void. It was a condition subsequent, not precedent; and that clearly made it bad. But in giving judgment, Hall, V.C., said, in reference to the argument and the authorities quoted, that he could not lay down the rule that the case of a man was similar to that of a woman in this respect. "Indeed, in the case of *Newton v. Marsden*, 31 Law J. Rep. (Ch.) 690, decided in 1862, Lord Hatherley, then Vice-Chancellor, seemed to have taken it as settled law that such a con-

dition could not be imposed on males. The different grounds for this purpose between the case of a man's second marriage and a woman's second marriage might not satisfy all minds, although they might many."

We do not remember any Scottish case in which a distinction was drawn between men and women as to the validity of a condition against a second marriage. In *Fowles v. Gilmour* (1672), M. 2695, the condition *si vidua manserit et non nupersit* was held consonant to law and not reprobate. In *Kidd v. Kidd* (1863), 2 Macph. 227, the distinction said to exist in English law was stated not to be the law of Scotland.

*Water collected—Vis Major.*—In the leading case of *Rylands v. Fletcher* (L. R., 3 E. & I. App.), the rule of law as to the damage suffered by the escape of water, or anything else collected and kept in one's premises, is expressed in the opinion of Blackburn, J., given in the Exchequer Chamber, and which the reader will find quoted in a note on the case of *Crompton v. Lee*, ante, p. 44. In *Rylands*' case the defendant was found liable for the escape of water collected in a reservoir, which flowed through some old workings into plaintiff's mine, and so caused it to be flooded. It was held that the person who for his own purposes brings, on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it at his peril. The case of *Nichols v. Marsland*, in 44 L. J. Rep. (Ex.), was of a similar kind, but a different result was arrived at, and a qualification of the doctrine of *Rylands* was made, or at least a distinction was pointed out which does not at first strike one in reading that case. The defendant had three artificial lakes in her pleasure-grounds formed by penning up a stream which ran through these grounds. Owing to a very heavy fall of rain, the lakes overflowed their banks and carried away some bridges built over the stream. The plaintiff claimed compensation for their destruction. At the commencement of the defendant's case the jury interposed, and said they were of opinion that there was no negligence on the part of the defendant, and that the bursting of the lakes was caused by *vis major*. Chief-Justice Cockburn thought the rain did not amount to *vis major*, and directed a verdict for plaintiff, with leave to enter it for defendant if the Court should think a downfall of rain amounted to *vis major*. The Court of Exchequer held that there was evidence of the downpour of rain being so excessive as to amount to *vis major*, and that as the injury was caused not by the defendant but by an agent over which he had no control, this distinguished the case from *Rylands v. Fletcher*. No doubt it was not the act of God or *vis major* in the sense that it was physically impossible to resist it, but in the sense that it was practically impossible to do so. Had the banks been twice as strong, or if that would not do, ten times and ten times as high, and the weir ten times as wide, the mischief might not have happened; but these are not practical conditions.

They are such as to enforce them would prevent the reasonable use of property in the way most beneficial to the community." After referring to the case of a stack of chimneys falling, and stating that there was no difference between a reservoir and a stack of chimneys for such a question as this, Bramwell, B., said: "A man may use all care to keep the water in, or the stack of chimneys standing, but still he would be liable if through any defect, even though latent, the water escaped or the bricks fell. This case differs wholly from *Rylands v. Fletcher*. There the defendant poured the water into the plaintiff's mine; he did not know he was doing so, but he did it as much as though he had poured it into an open channel which led to the mine without his knowing it. Here the defendant merely brought the water to a place whence another agent let it loose, but that act is that of an agent he cannot control. I am by no means sure that the comparison of water to a wild animal is exact; I am by no means sure that if a man kept a tiger and lightning broke his chain, and he got loose and did mischief, that the man who kept him would not be liable. But this case, and the case I have put of the chimneys, are not cases of keeping a dangerous beast for amusement, but of a reasonable use of property in a way beneficial to the community. I think this analogy has made some of the difficulty in this case. Water stored in a reservoir may be the only practical mode of supplying a district, and so adapting it for habitation. I refer to my judgment in *Fletcher v. Rylands*, 13 W. R. 992; 3 H. & C. 774, and I repeat that here no right of the plaintiff's has been infringed, and I am of opinion that the defendant has done no wrong. The plaintiff's right is to say to the defendant, *sic utere tuo ut alienum non lædas*, and the defendant has done this, and no more."

In *Rylands v. Fletcher* a good deal was said about bringing on to land what was not naturally there, and the natural and ordinary use of the land. So far as this goes, the case of the defendant in *Nichols v. Marsland* was the worst of the two. To erect a reservoir for a mill is a much more natural use of the land than to make an artificial ornamental pond. The distinction between the cases appears then to be this, that although the defendant in *Rylands* was not guilty of personal negligence, and although he employed a competent engineer and contractor, yet they, by inquiry, might have discovered the existence of the old workings into which the water flowed, with the effect of flooding the mine, and they failed to do so.

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#### A VACATION INVITATION.

THOU brooder o'er sad things that were,  
 Thou dreamer of sad things to be,  
 Come, cease thy burden and thy care  
 Beside the sea.

Mein brooderman,—a lighter vein  
 Befits the birth-place of the free  
 And easy,—rest thy heart and brain  
 Beside the sea.

Here London wags forget their jokes,  
 And leader-writers drop their "we;"  
 In fact, they look like other folks  
 Beside the sea.

Come, and the wild fresh breeze enjoy,  
 Where patient waiteth no P. D.  
 (Job was in youth a printer's boy  
 Down in Judee).

Away throw Erskine, Stair, and Hume,  
 And take your whiff quite tranquilly;  
 We do not fret, we only fume  
 Beside the sea.

Throw down your *Times*—all rotten boroughs,  
 And Herze—Herze—thingummy,  
 Come listen to the sweet *susurrus*  
 Beside the sea.

Here there's no flippant fireside chat,  
 No agent bothers with a fee.  
 [Bedad, you needn't go for that  
 Beside the sea.]

L.

GALWAY.

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## The Month.

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*General Council of Procurators.*—The annual meeting of this body was held in Edinburgh on the 18th of September last. The following office-bearers were unanimously appointed to hold office until the next annual meeting, viz.:—President, Mr. William M'Clure, Greenock; vice-presidents—Messrs. John Gair, Falkirk; Charles Stewart, Inverness; and Sir William Broun, Dumfries; secretary and treasurer, Mr. J. W. Barty, Dunblane; and special councillors—Messrs. William Shiress, Brechin; W. R. Gordon, Banff; J. Ironside, Crieff; E. P. Dykes, Hamilton; F. C. M'Kenzie, Forres, and R. Watt, Airdrie. Messrs. John B. Baxter, LL.D., Dun-

dee, and A. McNeel Caird, Stranraer, are *ex officio* councillors under the bye-laws as retired presidents.

*Regulation of Public Schools in America—Right of Coloured Children to attend—Religious Instruction.*—The regulation of our public schools has recently been considered in two cases, one in California and the other in Ohio. The questions at issue are among the gravest ever presented to our courts. They involve issues of the most delicate and far-reaching character, and concern the destiny of millions and the stability of our political institutions. They are not mere questions of taste or sentiment, such as the dispute whether the existence of God ought to be recognised in our Federal constitution, but are questions of practical rights, of religious and political privilege.

The case in California is *Ward v. Flood*, 48 Cal. 36, and is of a purely political character. It decides, first, that the legislature cannot, while providing a system of education for the youth of the State, exclude from its benefits certain children, merely because of their African descent; and secondly, that the law providing for the education of children of African descent in separate schools, to be provided at the public expense, the same as other schools, is not in conflict with the constitution of the State or that of the nation. The action was an application for a writ of mandamus, commanding the principal of the Broadway Grammar School to admit a coloured child to that school. The decision, perhaps, can scarcely claim the weight of a direct adjudication on these questions, because it appeared that there existed a valid reason for the exclusion of the applicant, namely, her lack of the instruction necessary to enable any child to enter the school; upon which ground the application for the writ might have been denied. The willingness of the Court to waive this ground, and to consider the question on the other ground, cannot work any difference in the real character of the decision. The observations upon the constitutional questions, therefore, must be conceded to be *obiter*, but are still entitled to respect as the utterances of a highly intelligent Court.

The main inquiry of the judges was in reference to the bearing of the 13th and 14th amendments of the Federal constitution upon the State law for separate schools. These provisions prohibit slavery and involuntary servitude, and the enactment of any law which shall abridge the privileges and immunities of citizens of the United States, or deprive any person of life, liberty, or property, or the equal protection of the laws. The decision upon these enactments was based upon that in the case of *Roberts v. City of Boston*, 5 Cush. 198, where the Supreme Court of Massachusetts, in 1849, considered the effect of provisions of the constitution of that State even more stringent than those of the present Federal constitution, and decided that if the commonwealth provided separate schools for coloured children, such children could not enforce admission to

the schools provided for the white children. Indeed, the matter seems to be one of mere regulation by the school authorities. They may separate the white children into grades and classes if they choose, and in fact they do so; and they may determine the line of separation by any arbitrary standard which they choose to set up—colour, race, age, height, proficiency, or whatever it may be. The right of the child is to have his education at the public expense. The particular mode in which the right shall be granted is for the local authorities to decide.

The other case to which we allude is *Board of Education of the City of Cincinnati v. Minor*, 23 Ohio, 211; 13 Am. R. 233. This case decides that the constitution of the State does not enjoin or require religious instruction, or the reading of religious books, in the public schools, and that the legislature having placed the management of the public schools in the charge of certain officers, the courts have no authority to dictate the course of instruction or the text-books. The action was brought by the defendants in error to restrain the plaintiffs in error from enforcing two resolutions passed by them, prohibiting religious instruction, the reading of religious instruction, including the Holy Bible, and singing of a religious character by the pupils, in the public schools. These resolutions recite that it is the true object and intent of the resolutions "to allow the children of the parents of all sects and opinions, in matters of faith and worship, to enjoy alike the benefit of the common-school fund." This expresses the gist of the whole matter, as we believe.—*Albany Law Journal*.

*The Language of Statutes—Municipal Elections Act.*—More than once we have had occasion during the last twelve months to comment on the slovenly and slipshod manner in which our Acts of Parliament are drawn. In reviewing the Statutes of 1874 we drew attention to the Powers Act. That Act was never intended to apply to Scotland. If it does apply it makes a very material alteration on our Scotch law. There are no words excluding the application of the Act to Scotland, and there are no terms used in the Act which are not quite intelligible to a Scotch lawyer. The evil and puzzling consequences of having Acts drawn so badly as they now are, and have been for not a few years, led to the appointment of a Committee to consider what steps should be taken to have Acts of Parliament better framed. Although the committee had in its ranks some men of great knowledge and ability (Mr. Lowe was on the list), the Report which was issued by them was as feeble, unsatisfactory and unsuggestive a production as we have seen for some time. There is one very obvious suggestion which does not seem to have occurred to the committee, and it is this: when an Act is not intended to apply to Scotland, that should be expressed in plain terms. If this were done, a great deal of trouble would be saved to unfortunate lawyers who have to understand Acts, and even more unfortunate public officers who have not only to understand Acts, but

who have to administer them, and who are obliged occasionally to spell out from the language of these Acts whether they are capable of being applied to Scotland. It is a very simple process to insert a clause in a bill, stating that the Act does not apply to Scotland. A line and a half would do it. If those responsible for the conduct of legislation grudge the expense of having a trained lawyer to look into these matters,—why, a railway porter, who has been in the habit of sticking a label on portmanteaus stating where the article is to be sent to, might be hired, at no extravagant salary, to stick a label on the back of the bill, saying whether it was to go to Edinburgh or to Westminster.

The droll and curious thing is that, this very session of Parliament, when public attention had been so much directed to the blundering manner in which Acts of Parliament have been drawn, that a committee was appointed to inquire into the matter and report,—this very session we have an Act of the kind just referred to; an Act which was not intended to apply to Scotland, an Act whose non-application to Scotland might have been expressed in a very few words, but whose non-application to Scotland is not expressed at all; an Act, too, which has reference to a great public matter of almost immediate importance. We refer to the "Act to amend the Law regulating Municipal Elections," to which Her Majesty's assent was given on the 19th of July last.

In another page there will be found a letter from a correspondent calling attention to the subject. If this Act does apply to Scotland, it revolutionizes our whole system of municipal elections. We agree with our correspondent in thinking that it does not apply to Scotch municipal elections. There are indeed no words in the Act expressly excluding its application to this country; but every Scottish lawyer knows that the Appointment Act, which was not intended to apply to Scotland, but from the operation of which Scotland was not exempted, was, in the case of *Bridges v. Fordyce*, decided about thirty years, found to apply; although nobody in this country knew anything about the Act until some years after it had been passed. There are many reasons for thinking that the Municipal Amendment Act does not affect us here in this part of the world.

We do not so much found on the circumstance that the Act amended is an English Act. The Act amended in the case of the Appointment Act was an English one also. There is this difference however between the two cases, that in the second section of the Appointment Act these words occurred, "all rents charge . . . and all other payments of every description in the United Kingdom of Great Britain and Ireland,"—words the effect of which it was very difficult to get over. But the great reason for holding that this new Act does not apply to Scotch municipal elections is that it cannot be worked in Scotland. The Act refers to the burgess-roll—there is no burgess-roll in Scotland. It refers to the duty of mayors—



we have no mayors in Scotland. It refers to auditors and assessors—we have no auditors and assessors, as municipal functionaries, in Scotland.

Those who have the conduct of the Scotch municipal elections, which fall to be made next month, are, as it appears to us, perfectly justified in ignoring this Act and conducting the arrangements in the old way; and if any cantankerous candidate who has failed to get elected should bring an action of reduction in the Court of Session, and a general capsiz should take place, they must just “whistle o’er the lave o’t.” Whoever may be to blame, it will not be the municipal authorities. The grim observation of Lord Lovat occurs to us in this connection,—“The mair mischief, the better sport.”

*Appointments.*—There has been no appointment as yet to the seat on the bench vacant by the death of Lord MACKENZIE. We should like to know if we are to keep this statement in type, so that it may be inserted again after the Court of Session meets on the 15th of October. A strange mystery hangs over the matter.

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### Obituary.

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#### SIR GEORGE HONYMAN.

SIR GEORGE ESSEX HONYMAN, late one of the Judges of Court of Common Pleas, died on the 18th of September at Tunbridge Wells. Sir George was connected with Scotland, being the representative of the family of Armadale, Sutherlandshire. The first baronet was Sir William Honyman, well known as Lord Armadale, one of the Judges of the Court of Session early in this century. The late Judge, who was the fourth baronet, was born in 1819; he was called to the bar of the Middle Temple in 1849, joined the Home Circuit, and was appointed Queen’s Counsel and a Bencher of his Inn in 1866. In January 1873, on the retirement of Justice Byles, he was appointed a Judge in the Court of Common Pleas, but two years later ill-health compelled him to resign his post, and he was succeeded by Justice Huddleston.

#### G. D. FORDYCE, ESQ.

GEORGE DINGWALL FORDYCE, Esq., Advocate, died on the 7th September, at his residence in Forres Street, Edinburgh, in the sixty-eighth year of his age. He was the fourth and youngest son of the late William Dingwall Fordyce, Esq., the younger, of Culsh, Aberdeenshire, brother of the late Mr. Alexander Dingwall Fordyce, of Culsh and Brucklay, who was for some time M.P. for Aberdeen,

and uncle of the present member for one of the divisions of the county. Mr. Fordyce, who was born in the year 1808, passed as Advocate in 1832, was appointed an Advocate-Depute by the Whig Government of the time, afterwards became Sheriff of Sutherland and Caithness, and, on the redistribution of Sheriffdoms, was made Sheriff of Ross, Cromarty and Sutherland, which office failing health compelled him to resign a few months ago.

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### Correspondence.

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#### MUNICIPAL ELECTIONS ACT, 1875.

*To the Editor of the Journal of Jurisprudence.*

24th September, 1875.

SIR,—It appears that question and discussion have arisen regarding the extent and applicability of the "Municipal Elections Act, 1875" (38 & 39 Vict., ch. 40). The question is, Whether the Act does or does not apply to Scotland. This is just another illustration of the absurd consequences which result from the recently devised practice of trying to adapt English legislation, by some slipshod clauses, usually bearing the heading "Application of the Act to Scotland." The serious consequences which have resulted from this peculiar method of legislation have been exemplified in recent litigations. With reference, however, specially to this Municipal Election Act, I do not think that anybody on this side of Tweed need give himself any concern. Parliament, or those responsible for the conduct of the Bill, may have made some technical omission, but the application of the Act to Scotland need not be tried. It is to be hoped that those responsible for the administration of the Elections Act in Scotland will not lead themselves into troubles trying to adopt the Act. If they do, they will incur a responsibility which the framers of the Act had no idea of laying upon them. By the Ballot Act, which this Act amends or alters, there is an application to Scotland in a very clumsy and unsatisfactory way. Here there is no "application;" and we have no such officers, in the sense of the Act, as (say) councillors, auditors, and assessors. The Act, indeed, is an English one, and if any trouble arises out of its having been passed, that will rest to no extent with those who, administering the law in Scotland, must regard what is practical. This means that, whatever was meant by the Act, it must be regarded exclusively as an English, and not as a British statute.—I am, &c.,

R. S.

## Notes of English, American, and Colonial Cases.

**FREIGHT.**—*Payment of Freight—Liability of Shipper—Contract.*—Plt., as master of a ship lying in London, entered into a charter-party with L., a ship-broker, to carry a quantity of iron at a tonnage freight. By the charter-party, freight was to be paid in London on signing bills of lading, the owner to have an absolute lien for freight. On the same day L. re-chartered the ship to defts. to carry the same quantity of iron at an increased freight, with similar provisions as to payment of and lien for freight, and with this clause—"The brokerage of five per cent. is due on the execution of this charter to L., by whom the vessel is to be entered and cleared at the port of loading." L. had, however, no authority to act as broker for plt., or to receive the freight. Neither plt. nor defts. knew of the charter-party entered into by the other. The iron was shipped by the defts., and the master signed and defts. received bills of lading, by which the iron (stated to be shipped by defts.) was to be delivered to consignees or assigns, "paying freight for the said goods as per charter-party." Plt. did not claim the freight on signing the bills of lading, and delivered the cargo without insisting upon his lien. L. in the meantime obtained the freight due from defts., and, having stopped payment, the freight due under his charter was not paid to plt.—*Held*, that the plt. was not entitled to recover freight from defts. as shippers of the iron, inasmuch as both parties made a mistake as to the charter-party referred to in the bills of lading, and were consequently never *ad idem*. No contract could therefore be implied on the part of defts. to pay freight to plt.—*Schmidt v. Tiden*, 43 Q. B., L. J. Rep. 199.

**TRADE-MARK.**—*What words will not be protected.*—This action was brought to restrain the deft. from the use of certain words claimed by plt. as a trade-mark. It appeared that plts. prepared a medicine, the principal ingredients of which were iron, phosphorus, and elixir of calisaya bark, which they named "Ferro-Phosphorated Elixir of Calisaya Bark," and so labelled the bottles containing it.—*Held*, that this phrase could not be protected as a trade-mark; that words or phrases in common use, and which indicate the character, kind, quality and composition of an article of manufacture, cannot be appropriated by the manufacturer exclusively to his own use as a trade-mark, and this is so although the form of words or phrases adopted also indicate the origin and maker of the article, and were adopted by the manufacturer simply for that purpose. The combination of words must express only the latter to authorize its protection as a trade-mark.—*Caswell v. Davis*, N. York Court of Appeals.—*Albany Law Journal*.

**PASSENGER.**—*Loss of Ticket.*—Plt. was a passenger on deft.'s steamboat, having a ticket for New York; on retiring to his berth at night he exhibited his ticket to an employé of deft., whose duty it was to examine it. The next morning the boat having arrived in New York, as plt. was passing off the boat with the other passengers, his ticket was demanded of him by the deft.'s agent, and he, not producing it, was turned back. Afterward he explained to deft.'s agent that he could not find his ticket, and demanded to be allowed to go ashore, but the agent refused to allow him so to do unless he either produced the ticket or paid the fare. He finally, after having been detained for two hours, paid the fare under protest, and brought his action for assault and battery and false imprisonment.—*Held*, that if it is the custom of carriers by steamboat to collect the passage tickets as the passengers are leaving the boat, and a passenger attempts to land without a ticket, alleging that he has lost it, the carriers have the right to detain him a reasonable time, to inquire on the spot into the circumstances of the case; and that if carriers by steamboat require passengers to buy tickets before going on board and to deliver them up on landing, the loss of a ticket by a passenger falls on him and not on the carriers, and it is his duty on landing to pay the amount of the fare.—*Standish v. Narragansett Steamship Co.*, 111 Massachusetts Reports, 512.

# The Scottish Law Magazine and Sheriff Court Reporter.

## SHERIFF COURT OF PERTHSHIRE.

Sheriffs ADAM and BARCLAY.

EARL OF BREADALBANE v. PLACE.—11th May, 23rd June 1875.

*March Fences*—Act 1661, cap. 41.—A petition was some time ago presented by the Right Honourable the Earl of Breadalbane and Holland to the Sheriff of Perthshire, craving that Edward Gordon Place, Esq., of Lochdochart, be ordained to concur with his Lordship in erecting, at their joint expense, march-fences between the petitioner's lands of Glenfalloch, Achreoch, Craiganskiach, and others, and the resp't's lands of Crianlarich, Stronua, and Corryandoran, and others, all in terms of the Act 1661, c. 41. The defr's lands consisted of certain patches surrounded by the estate of Breadalbane. The defr. maintained that the Act did not apply to cases in which the expense of the march-fences greatly exceeds the value of the lands enclosed. On a remit and report from Mr. Leslie, C.E., the following interlocutors were pronounced by S.-S. Barclay and Sheriff Adam under appeal by the respondent. Mr. Place thereafter appealed to the Court of Session, but subsequently abandoned the same, so that the interlocutors of the inferior Court Judges have become final :—

*Perth, 11th May, 1875.*—Having heard parties' procurators, and made avizandum with the process and debate, conjoins the action of interdict at the instance of the same pursuer against the same defr. with this process : Repels the defr's second, third, and fourth pleas : Reserving all questions as to the extent and kind of fences to be erected between the respective properties of the parties ; and orders the cause to be enrolled for further procedure.

“HUGH BARCLAY.

*Note.*—This action is founded *solely* on the Scotch Act, 1661, for ‘erecting fences,’ and not on the Act 1685, for ‘straightening marches ;’ so that several of the decisions founded on by the defr. to exclude this action, being rested solely or partially on the last-cited statute, do not apply to the present issue. Questions also arose in several of these cases where marches existed by rivers, water-runs, and ditches ; and, therefore, do not apply to this case, except it may be in one portion. The question whether, at some places, marches are unnecessary because of natural barriers, or what kind of fence is proper for certain portions of the lines, is of course reserved for further judgment. The point argued before the S.-S., on the part of the defr., was that the statute did not apply to *any* of the portions of marches, because the *amount* of benefit was not *equal* as between the parties. The pursuer, it was argued, with an extensive estate around, could well sustain the corresponding expenditure. But it was maintained that it would be a sacrifice of the value of entire pieces of ground possessed by the defr. to compel him to pay half of the expense of erecting fences of whatever description. The S.-S. has carefully examined all the authorities cited by the parties, and many others beside. The conclusion he has reached is that, in the Act, there is no definition of extent of the properties to be dealt with, or the *amount* of benefit respectively to be received on either side. Nor is any exception made than borough acres, which supports the general application of the Act to all other properties. No doubt it has been justly found that the Act cannot be made an engine of oppression, as to compel a *small feuar* to pay half of a march-fence where it is obvious he receives *little* or no benefit ; but which is solely for that of a neighbouring estate. The Act, however, has been often applied in cases where there is *mutual* benefit to both heritors, though the *extent* or *amount* is unequal, or perhaps admits of no exact ascertainment. The Court has found that ‘the Act ought to be interpreted as

respecting cases in which *mutual*, though not therefore *equal*, advantages were to accrue to the conterminous tenements.' (B., March, 1784; *Buchanan v. Malcolm*, Mor., 10,497; see also 20th January, 1758, *Lochhan*, Mor., 10,483). That the erection of march-fences is *essential* for the possession of both parties to this case admits of no doubt, and therefore *mutual* benefit follows, though the *greater* may rather be to one than the other. This fact is proved by the long-continued mode of dealing with these strangely-isolated and intermixed portions of land. Mr. Leslie's very clear and exhaustive report proves beyond all doubt at once the necessity and benefit of proper fences. The rental of the immediately adjacent lands are nearly equal. The rental of the larger estates of which they are portions has no bearing on the subject. The expense to be borne by Mr. Place in the erection of the fences, when contrasted with the purchase value of the patches, certainly is great; but then the expense of continued guardianship by shepherds, as reported by Mr. Leslie, is as great, not to mention the damage to stock by disturbance, and the consequent occurrences of strife between the rival herdsmen and their respective masters. In fact, without the enclosures, these patches appear incapable of possession, and so far, therefore, the benefit is greater to Mr. Place than to the pursuer. The origin of the singular detached portions of land, so intermixed with others, cannot be explained even by the ancient custom of 'rundale,' and must be traced to the long-abolished custom of sheep-farming by 'summer haining' and 'shealing,' now superseded by the winter pastures in the low country. Parties are at issue as to the boundaries of two of the defrs. shealings, which must be ascertained in the competent Court before the marches are finally adjusted, at least so far as regards those of the disputed portions. The question as to the *kind* of fences is also reserved. That they are not to be limited, to the *kind* specially mentioned in the Act centuries before the introduction of wood and wire fences, is settled by long contrary practice. It has often been recognized that the law must yield to social progress, and new customs must take the place of those which have served their generation and passed into oblivion, otherwise many statutes would remain inoperative. (See 20th February, 1829, *Forbes*, 7 Shaw, 441). The S.-S. cannot refrain from adding his recommendation to that of the reporter, and express a hope that some permanent arrangement might be made whereby the possessions of the parties may be finally adjusted for their mutual advantage, which no erection of fences of whatever kind is ever likely to accomplish. The following authorities were referred by the parties:—*For the Pursuer*—*Earl of Crauford*, Mor., 10,475; *Seaton*, Mor., 10,476; *Strang v. Stewart*, 31st March, 1864; *Pollock v. Ewing*, 25th May, 1869. *For the Defender*—*Earl of Cassilis v. Paterson*, 28th February 1809; *Earl of Peterborough v. Garioch*, 1784, M., 10,497; *Lord-Advocate v. James Sinclair*, 26th November 1872. H. B."

"*Edinburgh*, 23rd June, 1875.—The Sheriff, having heard parties' procurators, and made avizandum with the debate and whole process, dismisses the appeal and adheres to the interlocutor appealed from. JAMES ADAM.

"*Note*.—The Sheriff is not disposed to question the soundness of the law set forth in the second and third pleas-in-law for the resp't., and which have been repelled by the interlocutor under appeal. The Court will not order the erection of a march-fence under the Acts 1661, cap. 41, and 1685, cap. 39, where the expense of doing so would be disproportionate to the value of the ground to be benefited (*Cassilis*, 28th February, 1809, F.C., *Lord-Advocate v. Sinclair*, 11 Macp., 137), or where the erection of the fence would prove injurious or oppressive to the conterminous proprietor, whether that result might be intended or not. (*Peterborough*, Dict., 10,497.) It appears to the Sheriff, however, that the assumption of fact on which these pleas are founded is erroneous. The petition relates to the fencing of three subjects belonging to the resp't.—*Corryandoran*, *Stronua*, and *Crianlarich*. A remit was, of consent, made to Mr. Leslie, civil engineer, to report, and Mr. Leslie has given in a report which is not objected to by either party, 'in so far as the same represents

facts.' As regards Corryandoran, the expense of the fence proposed by Mr. Leslie is very heavy, the resp'ts. share of it amounting to about eight years' purchase of the rental of the property to be fenced. This, no doubt, in part, arises from the fact that Corryandoran is entirely surrounded by petr's. property; and the question raised relates to the fencing of the subjects on all sides at once, and not, as is usually the case, to the erection of a fence along one side of a property only. Mr. Leslie is of opinion, and reports, that it is indispensable that this property be fenced all round, and that the expense of doing so would be less than the expense of the extra shepherds, which would otherwise have to be kept. If the reporter be correct in this opinion, and the Sheriff sees no reason to doubt it, it would seem to be impossible to avoid the conclusion, that the case is one falling within the Act, and that the resp't. ought to be ordained to concur with the petr. in fencing the ground. With reference to the non-necessity of a fence, where the nature of the ground forms a natural fence, Mr. Leslie points out that in certain rocky and inaccessible places it may not be necessary to erect a fence, and the matter has been reserved by the interlocutor appealed from. As regards Stronua and Crianlarich, Mr. Leslie reports that it is necessary that these properties should be fenced. The resp'ts. share of the expenses of the fences proposed by Mr. Leslie amounts to about two years' and 1½ years' rent of the properties respectively. The expense seems not to be disproportionate to the advantage to be derived from the erection of the fences. The resp'ts. fourth plea, which has also been repelled, is unfounded in law. The Sheriff thinks that it is within the competency of the Court to determine what kind of march-fence is, in the circumstances, most suitable—whether wall or wire fence, or a combination of both—and to ordain its erection accordingly. (*Strang*, 25th March, 1864, 2 Macp., 1015; *Pollock*, 25th May, 1869, 7 Macp., 815). J. A."

*Act.—Charles W. L. Forbes.—Alt.—Mackenzie & Dickson.*

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Sheriff BARCLAY.

M'LAREN v. MACKENZIE.—9th September 1875.

*Education (Scotland) Act 1872—Liability of Parish Minister to pay School Rates.*—This was an action raised at the instance of Robert M'Laren, collector of parochial and school rates for the parish of Kenmore, against the Rev. James B. M'Kenzie, minister of that parish, for the purpose of having it determined that parish ministers are liable for school rates. After hearing parties, the Sheriff has issued the following judgment, which fully explains the case:—

"*Perth, 9th September 1875.*—This is an action 'for £1, 7s. sterling for school rates for the manse, glebe, and garden at Kenmore, possessed by him, for the year from 15th May 1874 to the 15th May 1875, as per account annexed.' This is the first case that has arisen in Perthshire under the Education Act, 1872, as to the liability of parochial clergy to pay school rates. In the absence of any decision by the Supreme Court, and with knowledge of only one Sheriff-Court decision, the Sheriff-Substitute has deemed it proper maturely to study the question for himself under the statute and authorities. Under the authority of the decision in *Forbes v. Gibson* in the House of Lords in 1852, there is no question but that parochial clergymen are *not* liable in poor rates, but it does not therefore necessarily follow that similar freedom exists from rating under the Education Statute. The question must first be looked at solely in the light of the Education Statute of 1872, passed subsequent to the decision of the Lords in 1852, and which it must be supposed was not unknown to the Legislature when maturing that statute. The case has not to be looked at from considerations of equity or of expediency, but is a question of hard law. No person can be taxed without legal sanction nor liberated from general taxation because of status or privilege, unless such is clearly expressed; but as a rule, taxing statutes receive a strict, and clauses of freedom a liberal, interpretation. The

test of liability or non-liability can only be found in section 44 of the Act, which alone gives the 'power to impose rates.' The first part of the clause is certainly somewhat adverse to the minister, as it does not in any way refer to the Poor Law, nor the assessment under the law, as being the only incidence and measure of school assessment, but expressly and *independently* authorises the assessment to be levied, 'one half upon the owners and the other on the occupiers, of *all* lands and heritages.' Ministers, at least in fact, if not in law, are the occupiers of manse and glebe, and there are no exceptions in the clause of any class of occupiers. The clause then proceeds as to the *manner* of levy. There is no conclusion to be rashly drawn that because the school rates are to be levied with the poor rates, the liabilities and exceptions are to be precisely the same. Poor rates and some other assessments may be levied in the same form and manner as Government taxes. But this in no way assimilates the liabilities and exceptions in national and local taxation, which respectively are regulated by the taxing and not the executive laws. The incidence of the assessment, notwithstanding its mode of levy, might have been varied. The 44th clause is wound up with words which unmistakeably *go beyond* the mere machinery of assessment and levy, and impinge directly on the *incidence* of the rate and liability of persons. In the case of parishes where there exists no assessments for the poor, and where therefore there exists no machinery to be adopted by the additional and separate assessment, the school rate is still to be imposed and levied. The clause, however, does not merely provide that the 'school rate shall in all cases be levied and collected in the same *manner* as poor's assessment.' Had the sentence stopped here, much might be said for the liability of the minister as occupier of heritages. But the clause proceeds thus, 'and the laws applicable for the time to the *imposition*' (mark that word), 'collection, and recovery of poor's assessment shall be applicable to the school rate.' Here the *incidence* of the school rate is clearly assimilated to that of the poor's assessment. A person liable or not liable for the one assessment is made equally liable or free from the other. If at any future time the assessment for poor's rates be again, as it once was, imposed on means and substance, then parish ministers should become liable, so far as their stipends extend, alike in poor's rates and in those for education. The Sheriff-Substitute, had he nothing else to guide him but the statute, would thus have sustained the minister's exemption. The Sheriff-Substitute, however, has looked into the case of Forbes in order to discover whether there was in *that* case any peculiar ground recognised for exemption from poor's rates which did not apply to the like immunity from school rates. In the Court of Session the decision was rested on immemorial usage of non-liability, and on the case of *Cargill*, in 1816, where it was held that 'a minister *qua* such was neither a tenant nor a possessor' of manse and glebe. There was also the argument arising from the amendment statute declaring him liable to be assessed on stipend, so that the inclusion of one article of liability inferred exclusion from all others. The House of Lords in affirming the judgment of the Court of Session, rested their decision chiefly, if not solely, on the clause rendering stipend liable in the assessment, and omitting to deal with manse and glebe which had up to that time been exempt from assessment, not only by usage, but by legal sanction. The Sheriff-Substitute is much confirmed in his opinion by the well-considered judgment given in 1874 by the Sheriff-Substitute at Kilmarnock, in favour of a minister, reported in the *Poor Law Magazine* (N. S., vol. ii., p. 385). But whilst thus emboldened by the opinion of Sheriff Anderson, he is not a little startled by the opinion of the Dean of Faculty, Rutherford Clark, Esq. (reported in the *Poor Law Magazine*, vol. ii.), which is entitled to the very utmost respect. In the first place, however, an opinion of counsel, however eminent, obtained on an *ex parte* statement, can never be placed on the same level as a judgment given on hearing both sides of the question. The opinion of that learned counsel was not asked nor given on the *single* question of ministers' liability, but on several other matters arising under the Act, and the answer on the point was given on two very different queries conjoined in one. Again, the learned counsel does not give his opinion

in *decided* terms, but as a mere '*think*.' As was said of Dirlerton, the doubts and thoughts of some people may be of greater value than the rash certainties of some other people. The Dean also views the school rate as a '*new tax*,' and consequently that there could be no usage in that view. But, with great submission, there existed for long ages the school assessment levied on heritages, payable in the same way from owners and occupiers, and applied to the same educational purpose. The Education Act directly recognised the already existing laws, and merely sought to amend and extend them by changing the managing body and extending the sphere of taxation, but still limited to heritage and divisible as before under the old law. The opinion of the Dean is chiefly weak as resting on the case of *Cowan v. Gordon* in 1868, where a minister was held liable for county road money. The report of that case need only be scanned in order to show its total inapplicability to the present case. 1st. The Road Act was a *local* county Act and not a *general* law, as is the Poor Law and Education Acts. 2d. There was not and could not be any *usage*, since the Road Statute only came into existence in 1864. 3d. There was no clause expressly defining the liability of parish ministers, as in the Poor Law, and thereby pointing out their non-liability beyond. The Lord President, in announcing the judgment, remarked—'The question now is, whether the present case has any resemblance to the case of Poor Law assessment. If there were here a similar inveterate usage of exemption, and if this statute contained a provision equivalent to the 49th section of the Poor Law Amendment Act, there would be similarity in the two cases, but if not the two decisions of Cargill and Forbes have no application.' Assoilizes the defr. from the claim. HUGH BARCLAY."

*Act.—Reid.—Alt.—Robert Mitchell.*

## SHERIFF COURT OF DUMFRIESSHIRE.

Sheriff HOPE.

PAROCHIAL BOARD OF ANNAN *v.* GOURLAY.—September 2, 1875.

*Poor Rates—School Board Rates—Cemetery Rates—Liability of Minister of Quoad Sacra Parish—Act 7 & 8 Vic., cap. 44, sec. 8.*—This was an action for recovery of poor rates, school board rates, and cemetery rates, amounting to £7, 0s. 3½d., raised in the Dumfries Small Debt Court by the inspector and collector to the Parochial Board of Annan, against the Rev. Mr. Gourlay, minister of the *quoad sacra* parish of Brydekirk, on his manse within the parish of Annan. In giving judgment, the S.-S. (Hope) stated that he believed it had come out in point of fact that so far as the assessment for the poor, school rates, and cemetery rates were concerned, Brydekirk was within the parish of Annan. The action was for payment of what were said to be arrears of poor rates, cemetery rates, registration rates and school rates. The minister admitted his liability for the school rate, but said he was not bound to pay either poor rates, cemetery rates, or registration rates. It appeared from evidence that for a number of years after his district was erected into a *quoad sacra* parish he did pay poor rates without dispute; but the question having been raised in another part of Scotland by a minister in similar circumstances, who obtained a decision in his favour in a sheriff court, the defr. thereafter objected to pay. The Sheriff said that he very much regretted so important a matter, affecting so many people, had been brought up in this form—simply as a small-debt case, in which his decision would be final. He wished it had been raised by a joint action on the part of *quoad sacra* ministers in the Court of Session, where it would have been settled in a satisfactory way. But having come before him, he must deal with it according to the best of his judgment. Now he thought himself safe in saying that, except for the wording of a clause in Sir James Graham's Act, 7 & 8 Vic., cap. 44, there would not have been much to plead for the exemption of defr. The 8th section of that Act, in specifying the manner in which parishes were to be erected by disjunction from



the old parishes, stated that it should and might be lawful for the ministers and elders of such new parish to have and enjoy the status, and all the powers, rights, and privileges of ministers and elders of the Church of Scotland; and taking his stand upon those broad—certainly broad and sweeping—words, the defr. said “I am a minister of the Church of Scotland, entitled to enjoy the status, and all the powers, rights, and privileges which ministers of the old parishes have.” Well, then, the question came to be, did those words of Sir James Graham’s Act affect civil matters, such as the payment of rates, or merely apply to ecclesiastical rights, privileges, etc.? Before answering that, it was necessary to consider the position of the old parish minister—that is, the minister paid out of the teinds—and that might be shortly stated to be that, from time immemorial, till the passing of the Poor Law Act now in force, he paid no poor rates whatever, either on his income or in respect of occupation of manse and glebe. That position, he might say, was decided by actions tried in the Court of Session. The right of exemption of old parish ministers, however, did not appear to have been founded on express Parliamentary enactment, but on custom; and accordingly, in order to make them liable, it was thought necessary to introduce a clause into the Poor Law Act now in force stating that they should be henceforth assessable on their stipends—no mention being made of the manses and glebes occupied by them. That was acted on for some time, and then arose a question for trial as to whether they were assessable on manses and glebes in occupancy. An action was raised, and was decided in the Court of Session on the 18th December 1850. The inspector of poor of the parish of Symington had taken diligence against the minister of the parish, the Rev. John Forbes, to recover payment of rates assessed on manse and glebe; and without going into all the details of the case, he might mention that the Court of Session held that the immunity which had previously existed in regard to all things in favour of the ministers was not affected by the Poor Law Act in regard to the manse and glebe—that was to say, they refused to stretch the application of that Act any further than the express words as to the stipends. That decision had since then been acquiesced in, and parish ministers paid poor rates on stipend where the means and substance system prevailed, but not on manse and glebe. Whether the manse and glebe would be assessable in the event of being let to other parties, was a question which had been raised, but which he need not now go into. The defr. was minister of a *quoad sacra* parish, and was here assessed on the manse which he occupied. There was no question before him as to his liability to pay on his stipend: it was simply a question whether he was to be assessed on his manse. The chief, if not the sole ground of the defr.’s contention was that, as a *quoad sacra* minister, he was entitled, by Sir James Graham’s Act, to the status, privileges, etc., of a parochial minister of the Church of Scotland. It was necessary to observe that those words occurred in a clause dealing with the creation of *quoad sacra* churches. This Act of Parliament also provided for the disjunction of parishes *quoad omnia*, which included things civil as well as things sacred. He tried very hard to get from defr.’s agent a definition of *quoad sacra* as opposed to *quoad civilia*, but he could not say that he was very successful in defining these terms. He might have said much in this connection in regard to the argument, but that was rendered unnecessary, for a decision in the Court of Session on another matter had recently been given, in which the judges, particularly the Lord President, delivered an opinion in which the terms were defined, and which he could not do better than read. This was an action brought by the minister and kirk-session of the parish of Cambusnethan asking the Court to declare that the minister and kirk-session of the *quoad sacra* parish of Wishaw, disjoined from Cambusnethan in 1855, were not entitled to make proclamations of banns of marriages in their church and take fees therefor. The First Division unanimously found that *quoad sacra* parishes were entitled to have banns proclaimed in their churches, and that the ministers and sessions were entitled to charge and receive fees applicable to such proceedings. The grounds on which this decision was given would appear from the opinions

of the judges. The Lord President said : " That section (namely, 8th section of Sir James Graham's Act) also authorises the Court to designate and to disjoin a district from the original parish, and to erect the same into a parish *quoad sacra* in connection with the Church of Scotland, the ministers and elders of which parish are to have and enjoy the status, and all the powers, rights, and privileges of parish ministers and elders of the Church of Scotland. But it is said that the persons who are resident in the detached district, which is annexed to this church only *quoad sacra* must, as regards all civil effect, be considered and dealt with as still parishioners of the original parish from which the lands have been disjoined and erected into this new parish. Of course that necessarily leads to the inquiry what is meant by the erection of a parish *quoad sacra*, or the erection of lands taken from one parish or from two parishes into a new parish *quoad sacra* ? And this again, in my opinion, renders it necessary to consider what is meant by a parish, and that necessarily takes one back to rather a remote period ; because the parochial division of Scotland is unquestionably a matter of very remote antiquity." The Lord President then proceeded to make an antiquarian investigation as to the origin of parishes, through which he need not follow him. " During this period " (that is, prior to the Reformation) the Lord President went on to say, " During this period of ecclesiastical history, therefore, there could not exist any distinction between those parts of the parochial economy which are now reckoned *inter civilia* and those which are reckoned *inter sacra*, because every parochial right and interest fell under the exclusive jurisdiction of the Church. But one of the results of the Reformation was that the patrimony of the Church was appropriated by the Crown and Parliament, and thus it became necessary for the Crown and Parliament to provide the means of carrying on the parochial economy. From this time, accordingly, ministers' stipends, manses, and glebes, the relief of the poor, and the establishment of parochial schools, and the maintenance of churches and churchyards, are provided by Act of Parliament, and all these parts of ancient economy are thenceforth materially and even necessarily classed *inter civilia*." It would thus be seen that the Lord President included among the things that were *inter civilia* the establishment of parochial schools and the relief of the poor. Relief of the poor was clearly *inter civilia*; and he must say he never had any doubt on the subject. If these matters were *inter civilia* then, was it necessary to say whether the words of Sir James Graham's Act, that a *quoad sacra* minister was to have all the rights, privileges, etc., of a parish minister, referred to things *inter civilia*, such as the relief of the poor, and made those things other than what they were before the passing of the Act ? and if this *quoad sacra* parish were only disjoined and erected according to that Act, from the original parish, would it not be a contradiction in terms to say that the rule of law as to things *inter civilia* was to be departed from on account of an interpretation that might be put on the words of Sir James Graham's Act ? It seemed to him that such a contention was wrong, and that there was no authority under this Act for relieving the defr. from assessment in respect of his manse. It was clear, he thought, where Sir James Graham's Act made disjunctions which included things *inter civilia* as well as things *inter sacra*, such disjunctions were called not *quoad sacra* but *quoad omnia*, which included the relief of the poor, excepting when all parties agreed to the contrary, when the Court of Session, at their instance, had power to decree that relief of the poor was to be exempted from the disjunction *quoad omnia*. It was therefore very evident that an incidental remark in the 8th clause of Sir James Graham's Act would not have the effect of changing the law of assessment as regulated by another Act of Parliament. If Sir James's Act had in this matter been intended to over-ride any other Act, it would have said so in distinct terms. Some analogous cases were quoted with the view of strengthening the defr.'s argument. For instance, a decision was pointed out in which the collector of the Widows' Fund sued a minister *quoad sacra*, in 1849, for Widow Fund rates, on the ground that he had then become a beneficed clergyman of the Church of Scotland, and was therefore bound to pay into

the Widows' Fund, and was entitled to have his widow provided for from it. He had gone over that case carefully, and had not been able to find anything in it that made it analogous with the present case. The more recent case which he had referred to seemed much closer than that—the case of *Grant v. Macintyre*, 14th July 1841. Between that case and this there was this distinction, that in the former the minister was incumbent of a Parliamentary church which had been erected under two statutes of the reign of George III. It was not, like the present case, the case of a district cut off and disjoined under Sir James Graham's Act; and it was found by the Court that he was not bound to pay into the Widows' Fund, for under the Widows' Fund Act it was set forth that ministers who, after a certain date, were admitted into a charge should then be liable to pay into the Fund, and it was held that the minister in this case was not admitted into his charge after the date mentioned, for he had been in it before in the capacity of a Parliamentary minister. That case was against the defr. so far that, while the Court held that the minister was not bound to pay rates into the Widows' Fund, they held that other *quoad sacra* ministers, who were not in the charge previously as Parliamentary ministers, under previous statutes would be bound to do so. In that case an exemption was claimed on the ground that a *quoad sacra* minister was not a beneficed clergyman; but it did not follow that in allowing all the rights and privileges of a beneficed clergyman in regard to religious matters, the Poor Law of Scotland was to be overturned. It was found that *quoad sacra* ministers, with the exception stated, were beneficed clergymen in the sense of the Widows' Fund Act, but it did not appear that they were unassessable in respect of manse and glebe under the Poor Law, which was a different thing. The only other point he had to consider was that a decision was given in the Sheriff Court of Airdrie by which it was found that *quoad sacra* ministers were not bound to pay poor rates. Now with all respect to his fellow-judges in the same position as himself, it is well known that the decision of one S.-S. did not govern that of another. He however had not seen the decision; and beyond the mere statement that the decision was so and so, he had no knowledge of it. He had no means of knowing the grounds on which it was come to: had he known them, it was possible his opinion might have been somewhat modified. But it was further stated that the Board of Supervision were of opinion that such a claim was not exigible, and there had been handed to him a letter written by the secretary to that Board dated January 21, 1870. It was not, however, an opinion of the Board, but merely of Mr. Skelton, the secretary. In it he said: "I have to acknowledge receipt of your (the defr.'s.) letter of date 17th inst., as to your liability to assessment in respect of your manse. My opinion is that wherever a Parliamentary parish or district (established under 5th George IV., cap. 90) has been erected into a parish *quoad sacra* under Sir James Graham's Act, 7 & 8 Vic., c. 44, the minister, by force of the enactment in section 8, which provides that he shall enjoy 'all the privileges of the parish minister,' is entitled to exemption from assessment on his manse and glebe. I may add that the late Mr. Shank Cook gave an opinion to the above effect." That opinion, however, did not apply to the present case, but merely to *quoad sacra* parishes that were formerly Parliamentary charges; and at any rate, he might say of this opinion, as he had said of that of a late Sheriff, that he was not bound by it. He had ventured to differ from the opinion quoted, and he thought he had pretty good reason to do so, when he had the authority of the Lord Justice-General on his side. He therefore thought that the exemption did not exist.

Act.—Alder.—Alt.—Muir.

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# THE JOURNAL OF JURISPRUDENCE.

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## THE PLEA OF INSANITY IN TRIALS FOR MURDER.

THE recent case of Tierney, tried at the last Glasgow Circuit, and the case of Bamfield, possessing various similar features to the first-named case, and tried before Mr. Justice Brett in England, have directed public attention in a somewhat marked manner to the plea of insanity advanced in defence of the charge of murder. In the former case, the jury, under the direction of Lord Ardmillan, brought in a verdict of murder, coupled with a recommendation to mercy on the ground of "excitement, probably due to previous insanity." In Bamfield's case the jury, in the face of Mr. Justice Brett's charge, brought in a verdict acquitting the prisoner on the ground of insanity. The jury in Bamfield's case probably stretched a point to prevent any after feeling in their own minds from the possible execution of the prisoner, who they did not believe was possessed of the complete mental faculties of a man whose mind had never been affected. In Tierney's case the jury gave effect to the law as laid down by the Judge, and convicted of murder, but coupled their verdict with a recommendation to mercy on a ground which substantially was an acknowledgment that the mind of the prisoner was to some extent deficient. In both these cases there had been, anterior to the commission of the act charged, a period of life when the prisoners were undoubtedly insane. The Scotch verdict was the proper and legal verdict, but there is much to excuse the English verdict. I propose in the first place to glance back at the more prominent trials for murder of recent years wherein the plea of insanity has been pleaded as a defence, not so much for the purpose of directing attention to these trials as for giving the definitions of our most eminent criminal Judges of the law of insanity as applicable to the responsibility or non-responsibility of persons accused of murder.

There are two forms which the plea of insanity may take; the  
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first is insanity in bar of trial, either put in on behalf of the panel or taken *ex proprio motu* of the Judge. This plea, however, is rarely advanced unless insanity is clearly demonstrable. The meaning of the plea is that the panel at the diet of trial is not in a fit state of mind to give instructions for his defence. It is not the class of cases where insanity is pleaded in bar of trial I propose to refer to, but to the class of cases where the alleged insanity is of an occult description, and where the plea of insanity is tendered as a special defence, to the effect that, if the act of which the prisoner stands accused was committed by him, he was insane at the time of its commission. I will not go back farther than the year 1860, in which year occurred the case of John M'Fadyen, accused of murder and theft (3 Irvine, p. 650). The panel pleaded generally not guilty, and specially that at the date of commission of the alleged act he was "of weak mind and insane." The prisoner was twenty-one years of age, and had been twice previously convicted of theft. Although twenty-one, he was of very juvenile appearance, for the mother of the murdered child spoke of the panel as a boy. The prisoner had flung a child of two years and three months into the water, and drowned it apparently for the purpose of stealing the child's clothes. The panel had been in a reformatory, and the head-master deponed to thinking him "very weak in his intellect;" he exhibited fear of punishment, and he "quite understood the distinction between right and wrong," but the witness qualified this by saying that "he did not do so owing to his weak intellect at all so strongly as others." Dr. Young deponed, "I consider that the panel has gone beyond the boundary line between sanity and insanity, as to which there is great difference of opinion among doctors, and I think he was of unsound mind." Dr. Morton stated, "On the evidence, and as the result of my interview with him, I consider that he understands the distinction between right and wrong, and truth and falsehood. I consider that he would be quite aware of what he was doing in an action rendering him liable to punishment." Dr. Coatts, one of the visiting physicians of Gartnavel Asylum, deponed: "I could not call the prisoner insane in the ordinary sense of the word. I concur very much in the view given by the master of the Reformatory Institution, whose evidence I heard to-day." Dr. Watson seemed to entertain much the same idea of M'Fadyen's state of mind as Dr. Yellowlees with reference to Tierney's state of mind. He stated in answer to the Court, "I consider that the panel had sufficient capacity to know that theft and murder were both acts wrong and punishable, but I consider that when the punishment that might follow his act failed to be imminent, his self-governing power was not such as to keep him back from doing in temptation that which he might know to be wrong. It cannot be said that his mental incapacity or disease was such as to destroy in his mind his self-governing power over his emotions or passions; yet a very slight temptation to ordinary

minds would appear to him a strong temptation. The getting of a few pence for the child's clothes might be to him an overpowering temptation." Lord Cowan, in his charge to the jury, told them that it was their peculiar province to judge whether insanity was established or not. He told the jury to keep in mind the circumstances under which the crime was committed, the manner of the act, the general history and conduct of the panel, and the opinions of the medical experts, and in these circumstances they were directed to consider the question whether the panel possessed "intellect enough to know the distinction between right and wrong, and that in the very commission of the crime charged, and at the time, or if he knew that distinction, was he under disability from want of sufficient rational power to govern his actions and to control his emotions and desires?" Lord Cowan further said to the jury, that if they were not satisfied that the defence of insanity had been proved, probably the safest verdict would be one of guilty, "accompanied by such recommendation as the undoubted weakness of the panel's intellect might appear to them to justify." The jury accordingly brought in a verdict of guilty, but strongly recommended the panel to mercy on account of weakness in intellect, and this recommendation was given effect to by the Crown commuting the sentence of death to one of penal servitude for life. The next prominent case of murder in Scotland where the plea of insanity was urged was the well-known case of Alexander Milne, who was accused of murdering James Patterson, a working jeweller, by stabbing him with a dagger in January 1863 (Irvine, vol. iv., p. 301). The special defence in this case was that the panel at the time of the act charged "was insane, and labouring under insane delusions." I do not propose to give any analysis of the evidence in this case, but it seemed distinctly to establish that, whether insane or not, in the sense of being legally responsible for the act, the prisoner at the time of the commission was subject to certain insane delusions. It was in this case the present Lord Justice-General made a somewhat celebrated remark on a question being put by the prisoner's counsel to a medical witness. The question was, "Is it not a possible condition of the mind in monomania that the patient might be well aware of the nature of the crime, and that he would suffer for it, and yet felt irresistibly impelled to commit the crime?" The Lord Justice-General's remark to that was, "If all the physicians in Europe were to state that, I would tell the jury that they must not believe it or act on it." In charging the jury in this case, the Judge said, "It is not sufficient to say that the man is in an anomalous state of mind from extrinsic causes, from drinking or anything else which makes the bad part of his nature predominate over the better, and which gets the better of the influences of conscience, or that he is in such a state of moral depravity that his conduct and his feelings are, it may be, not worthy of a human being. That is not insanity. Moral depravity or weakness of

mind, combined with or caused by moral depravity, is not insanity. But if the mind is diseased, that is to say, if the understanding is impaired to the extent I have already explained, then that is insanity, which will take away criminal responsibility. If there be such insanity, it matters not, as Mr. Scott also very properly stated to you, what was the exciting cause of that insanity. It may be drunkenness, or it may be indulgence in any other vicious propensity—it is of no consequence which it is, if insanity is actually produced and is present at the time.”

The jury returned by a majority a verdict of guilty, but recommended the panel to the mercy of the Court, and in answer to a question directed by the Court as to what the recommendation was based upon, it was answered that it was on account of the divided opinion of the jury, which is not a recognisable ground of recommendation. It did not proceed upon any recognition of mental defect. The sentence was however subsequently commuted to penal servitude for life. In the following year, 1864, “George Bryce” was indicted for the murder of a servant girl to whom he had been paying his addresses. He was tried before the High Court in May 1864 (4 Irvine, p. 506). The only defence in this case was insanity. It appeared that the prisoner had been of drunken habits prior to the date of the commission of the crime. He evinced great determination in carrying out the murderous act, first attacking his victim in the nursery of the house she was a servant in, and then, after she had been rescued by her mistress there and told by the latter to run away, which she did, she was followed by the prisoner out of the house, and he leaped a wall to get to her. He again threw her down and cut her throat with savage determination with a razor. There was conflicting medical evidence as to the prisoner’s state of mind. For the defence Professor Laycock stated, “His physical organisation is of a low type. I have heard the evidence to-day. I do not think him a man in his sound senses just now. I think that he was not of a sound mind at the time he committed the deed. I think he was labouring under a fit of maniacal excitement. Such a fit may come on suddenly and go off suddenly. That is not uncommon in homicidal mania. It is one of the characteristics of the fit that the person does not remember what he did under the fit. I think that for some years he has been more or less in a morbid state mentally.” Dr. Ritchie also stated his opinion that the prisoner was insane, and that at the time of the commission of the act he was under a maniacal paroxysm. The then Lord Justice-General, the late Lord Colonsay, presided at this trial, and in his charge to the jury he laid down the law as to insanity as applicable to the special case in the following terms: “The question of insanity—of insanity to the effect of relieving a party from responsibility—the question of whether a man is insane or not, is a question for you to decide. It is a question on the whole facts of the case; it is not a medical question. The medical

gentlemen have opportunities of observation which make their testimony very important in reference to such matters; but the question is not a medical question; it is a question of fact whether the insanity amounted to this, that he was doing a thing which he himself considered, and had grounds to believe, and respecting which his belief was a sincere one, that he was warranted in doing—whether he really believed that something had occurred which would be a ground for taking away the life of this unfortunate girl. It is a question for you whether his state of mind was such as to warrant you in sustaining this defence. It is no doubt true that, if the result of your inquiry should be that the prisoner committed this act in a state of insanity, he would not be let loose on society. The public must be protected against persons who have uncontrollable passions, but I can by no means endorse the doctrine that seems to be held, that when a man cannot control his disposition to do an act he is not responsible for it. Nothing is more common than a person being unable to control his passions. His passion gets the better of him, and he becomes for the moment beyond control. But merely because you call it a paroxysm of monomania, that is not a reason for holding that such persons are to be held as out of the pale of the law in regard to answering for the consequences of the crime they commit. But the result would be—if you are of opinion that he is insane—immediate restraint, and, as prisoner's counsel said, possibly subsequent restoration to society. But no matter for that; the question you have to decide is, has it been established, or has it not, that this act was perpetrated through insanity—insanity in this sense, that the party was bereft of mind, that he believed, from grounds that acted upon his imagination, that facts had occurred which warranted him in committing violence against the individual." In this case the verdict of the jury was guilty, coupled with a recommendation to mercy "on account of the low mental organization of the prisoner," but the sentence of death was carried into effect. The next case where the plea of insanity was stated was that of Andrew Brown, in Sept. 1866 (5 Irvine, p. 215). There seemed to be little or no proof tendered by the prisoner to establish his alleged insanity, but the case is important from the following clear exposition of the law as to insanity given by the then Lord Justice-Clerk, the present head of the Justiciary Court. "The main question for the jury to consider was that which had been set up by way of special defence, namely, whether the prisoner was in such a state of insanity at the time as not to be responsible for the act which he had committed. That question was always a delicate and important one, and it was one on which juries were entitled to expect some direction from the Court as to the legal rules applicable to such a case; and therefore he must at the outset state what was the true doctrine of criminal responsibility, and how and by what manner of evidence a man could be shown not to be criminally responsible for the act which he had



committed. It was quite clear that if the man knew what was the act he was committing, and if he knew further the nature of that act and its consequences and effects, he was criminally answerable for it. But if, on the other hand, from the oppression of mental disease, he was unable to know what was the act he was committing; or, knowing it, if he was in such a condition from insane delusions as not to be able to understand the nature of the act, and to appreciate consequences and effects, then he was in such a state of insanity that he was not answerable. But in order to constitute this insanity, it must be clearly made out that at the time of committing the act the prisoner was labouring under mental disease, in the proper sense of the term, and that that mental disease was the cause of the act. A person being of violent or passionate temper, or reduced to a state of weakness by the indulgence of bad habits, or in a state of moral depravity, either from the faults of original education, or from faults more personal to himself—these were things which had nothing to do with insanity. A man might be in the deepest state of moral depravity—and no man could be in such a state without being also in some degree of weak mind—but that would not constitute insanity. Nothing but mental disease which overpowered the reason constituted insanity in the eye of the law.” The prisoner in this case was found guilty as libelled, but a majority of the jury recommended him to mercy, on what ground does not very clearly appear. The sentence of death was however carried into effect. The next case of importance with reference to the subject I am dealing with is that of “Dingwall” in 1867 (5 Irvine, p. 466). The accused was a landed proprietor, and was indicted for the murder of his wife by stabbing her with a carving knife. The Report states: “He had occasional attacks of delirium tremens, particularly in and after 1851, and in that year, by instruction of his agents, a medical report was obtained as to whether he could be placed in a lunatic asylum; but the report negatived insanity, and the opinion of his medical attendants continued all along to be adverse to granting the necessary certificate. It was said that he had a stroke of the sun in India, and that after his return to this country he had convulsions which might have been epileptic, but no medical witness confirmed this.” I will not go into the evidence, but will only quote the following remarks of Lord Deas with reference to the special defence of insanity: “As to the law applicable to a plea of insanity, it was necessary to keep in view the nature of the alleged insanity, as well as the nature of the crime. There was an allegation here either of idiocy or what the law calls furiosity. This was not said to be a case of total deprivation of reason. Neither was it alleged to be a case of insane delusions. There was indeed no trace of delusion, sane or insane, throughout the proof. If acting under an insane delusion—believing for instance, that his wife was an assassin or a burglar, and not his wife at all—the

prisoner had put her to death, the defence would have been complete. A case might even occur in which the individual knew the nature of the act, and its legal consequences as inferring forfeiture of his own life, but where his delusion was that he must necessarily do the act and die for it to accomplish some great purpose of Providence, and if such a case were established, the defence of insanity would be sustained. Such was Hatfield's case for shooting at George III. But in a case like the present, where there neither was nor could be any pretence of insane delusion leading to the act, his Lordship thought the simplest and most unambiguous way in which he could state the law to the jury was to say that, if the jury believed that the prisoner, when he committed the act, had sufficient mental capacity to know, and did know, that the act was contrary to law, and punishable by the law, it would be their duty to convict him. This, his Lordship thought, was a safer and more accurate mode of putting the question before the jury, than to ask them to consider whether the accused knew right from wrong; for an assassin might believe it was morally right to kill his victim, and yet be responsible to the law and punishable accordingly?"

In Tierney's case it may be remembered that in some quarters the Advocate-Depute, who conducted the case for the Crown, was attacked for leaving it to the jury to say whether or not the act of which the prisoner was accused, which was unquestionably murder, if committed by a man whose mind was quite unimpaired, might not yet in the prisoner's case, if his mind was to a certain extent held by them to be impaired, amount merely to culpable homicide. Lord Ardmillan, I think rightly, charged the jury that the act of which the prisoner was accused could not be culpable homicide; but Mr. Muirhead has high authority for drawing a possible distinction between a murderous act perpetrated by the hand of a man with mind affected, and the same act perpetrated by a man with mind unaffected, as amounting in the former case only to culpable homicide, but the latter case being necessarily murder. It is in the following terms that Lord Deas, in his charge to the jury in Dingwall's case, recognised such possible distinction, and the jury taking their cue therefrom, returned a verdict of culpable homicide and not of murder: "The prisoner appeared not only to have been peculiar in his mental constitution, but to have had his mind weakened by successive attacks of disease. It seemed highly probable that he had had a stroke of the sun in India, and that his subsequent fits were of an epileptic nature. There could be no doubt that he had had repeated attacks of delirium tremens, and if weakness of mind could be an element in any case in the question between murder and culpable homicide, it seemed difficult to exclude that element here. His Lordship had anxiously considered that question, and had come to the conclusion that the element was not inadmissible. Culpable homicide in our law and practice

included what, in some countries, was called murder with extenuating circumstances. Sometimes the crime of culpable homicide approached the very verge of murder, and sometimes it was a very minor offence. The state of mind of a prisoner might, his Lordship thought, be an extenuating circumstance, although not such as to warrant an acquittal on the ground of insanity; and he could not therefore exclude it from the consideration of the jury here, along with the whole other circumstances, in making up their minds whether, if responsible to the law at all, the prisoner was to be held guilty of murder or of culpable homicide." I am not aware of any case occurring in Scotland, between this case of Dingwall's and the recent one of Tierney, where there was much room for doubt of the fact of the sanity or insanity of a prisoner charged with murder. Tierney's case is fresh in the recollection of the public, and I do not propose here to enter into details of the evidence. Suffice it to say the Crown admitted the fact of his having been insane some sixteen years ago, and the medical witnesses for the Crown admitted mental defect. Dr. Yellowlees stated in his evidence that his opinion was "that the peculiarity which this man has is not his natural temper or temperament, but is distinctly the result of his former attack of insanity, which left in the man's mind a certain amount of weakness, possibly confirmed by subsequent casual attacks of insanity." Again he remarked, "From what I have heard of his history, I believe that this amount of mental peculiarity may have lessened his power of self-control and self-regulation. I do not think that mental peculiarity was such as would make him the mere helpless instrument of his own impulses." The jury in Tierney's case, as has already been stated, convicted the prisoner, with a recommendation to mercy on the ground that the act might have been committed under "excitement probably due to previous insanity." Within a few days of the verdict, which was in accordance with the charge of a distinguished criminal judge, a letter appeared in the columns of the *Times* calling upon public opinion to prevent the capital sentence being carried out, and in my opinion in most unjust terms, only to be accounted for by imperfect information, attacking the evidence of brother medical experts. This letter provoked rejoinders from Doctors Yellowlees and Robertson, the Crown medical witnesses, which also appeared in the *Times*, while the consideration of whether the capital sentence should be carried out was still undecided by the Home Secretary. I express the opinion of every lawyer when I say that it is altogether contrary to propriety that Dr. Winslow should have written such a letter, and that the *Times* should have published it while the question of whether the royal prerogative should be exercised or not was under the consideration of the Home Secretary. It is well known that the medical and legal definitions of insanity are altogether different. I have given at length clear and accurate definitions of insanity of various of our most

eminent modern criminal Judges. But it will be observed that in most of the cases to which I have referred there was undoubted mental defect. Grammatically and medically, mental defect constitutes insanity, *i.e.* unsoundness, and accurately the special defence to be lodged in cases of the kind should not be that at the date of the alleged act the panel was insane, but that at such time the panel was not responsible through insanity. Turning from the legal definitions of insanity, I propose now to give the medical objection to the hard-and-fast line of responsibility and irresponsibility drawn by the law with reference to the mentally deficient. I can find no more striking language to do this in than that of Dr. Yellowlees, the Crown witness in Tierney's case, the Superintendent of Gartnavel Asylum, Glasgow, in the Paper which, in the Social Science Congress, held in Glasgow in October 1874, he read on "The Criminal Responsibility of the Insane." "In truth we presumably sane folks are dwellers in a table-land called mental health; the surface is uneven, but still practically it is a table-land. Far below is the sad dark valley of absolute insanity, and connecting the valley with the table-land, passing into each so gradually that no division can be seen, is a long sloping hillside, thickly peopled with a moving multitude of men, all of whom exhibit more or less pronounced, and more or less permanent insanity. . . . They are influenced by the same motives as ordinary men, they know right from wrong, and they act in many respects like reasonable and accountable beings. . . . But the influence of ordinary motives and the sense of responsibility from wrong-doing have power among the insane only to a certain extent and up to a certain point; they are overwhelmed and overborne, occasionally, periodically or permanently as the case may be, by morbid impulses or the force of delusions, and while disease is thus paramount, the patient is certainly not a responsible being. . . . Such are the dwellers on the slope; no two of them are alike, and each one is a variable and difficult study. Yet it is across this slope that the law tries to draw a rigid red line of legal responsibility, pronouncing all above the line to be sane and responsible, and all below it irresponsible, because insane. Or perhaps it is more correct to say that the law ignores the slope entirely, and assumes that a sudden chasm or precipice divides the table-land from the valley below.

"This assumption is contrary to all experience and to all analogy. Nature has no straight lines nor strict divisions, and certainly there is none here. If a man understands the nature and quality of the act he is committing, and knows he is doing wrong, the law declares him responsible even although he may be impelled to the act by insane delusions. This test includes among responsible agents not only all dwellers on the slope, but very many inhabitants of the hopeless valley. Certainly a majority of the insane understand their actions, and whether they are or are not contrary to law, but disease reckons nothing of moral or legal codes, and obeys only its

own morbid impulses." In another part of his paper Dr. Yellowlees says: "There are cases where the mental condition should modify rather than annul the penalty due to crime, and at present such cases either escape punishment altogether, on the ground of insanity, or are punished with unjust severity." It is, I should think, a question whether detention as a lunatic, which is the natural result of an acquittal on the ground of insanity, is not as much of a punishment as that of penal servitude for life, but in the former case there is a freedom from conviction of crime, in the latter there is not, and I suppose persons declared insane by a jury at the time of commission of a crime are not detained as lunatics all their lives, when it has become patent to everybody that whether insane or not at the date of the crime charged, their mental health is or has become perfect; of course also there would be no escheat to the Crown when a panel is acquitted on the ground of insanity. There is no doubt that practically the Home Secretary acts as a kind of Court of Review, and exercises the Royal prerogative of mercy wherever he thinks fit to interpose. As already pointed out, that prerogative was exercised in the cases of M'Fadyen, Milne, and Tierney, and no one who reads the evidence in M'Fadyen's case could come to any other conclusion but that, whatever the law might say as to responsibility, it would have been repugnant to the feelings of the community to have carried out the sentence of death. The mental defect in his case was unquestionably great, and though the jury undoubtedly rightly, according to the legal definition of insanity, held him responsible for the act committed, the moral guilt involved was not the same as that of a man in full possession of his senses, and further it was not the act which a man in the full possession of his senses could possibly have committed. It will not do therefore to say that limited responsibility is not to be recognised by the Crown; that where a jury under the direction of the Judge refuses to give effect to the plea of irresponsibility through insanity, in all cases the Crown must not interpose to prevent the sentence of death being carried out. That it seems to me would be opposed—as in M'Fadyen's case, or in Dingwall's case, had a capital verdict there been returned—to our sense of what is right and proper. At the same time, while recognising acknowledged mental defect as a proper ground for an inquiry by the Crown into the expediency of carrying out a capital sentence pronounced upon a person whose mind is admittedly weakened by disease, there is an unquestionable risk that justice may be defeated by the jury returning a verdict of not guilty in the face of the Judge's charge, in case a person with defective mind should be actually executed in consequence of their verdict, and such probably was the reason of the recent verdict in Bamfield's case. It is most certainly anomalous that there should be no legal recognition of mental defect, the proved existence of which is yet recognised and acted upon by extrajudicial authority. I venture with diffidence to suggest, in

order to avoid the risk of a jury refusing to convict where legal responsibility is undoubted, that it should be optional to the Judge, when insanity is pleaded on an unanimous recommendation to mercy by a jury on the ground of mental defect, to pronounce sentence of death or penal servitude for life. It is true that the Judge might not hold the mental defect to be such as to warrant him in not pronouncing sentence of death; but I believe if it was known that he had the option of pronouncing a sentence of penal servitude on a unanimous recommendation of mercy, based on proved mental defect, there would be little or no risk of a responsible criminal being acquitted on the ground of insanity. I believe it is held by some that a jury should itself have the power of barring the extreme penalty on the ground of mental defect not amounting to legal insanity. This deserves consideration.

As has already been pointed out, the plea of insanity frequently involves an occult and difficult inquiry. Anything tending to shed light upon the fact of an accused person being insane or not, one would think, ought not to be excluded. I confess that it has always seemed to me, looking to the undoubted fact that mental disease is often hereditary, one of the most extraordinary things in our law of evidence that evidence as to the insanity of near relatives should be excluded. The law of England is different. There is no doubt that insanity among relatives increases the probability of an individual becoming insane, and this is one of the inquiries made by every insurance company prior to accepting lives. In the case of *Dingwall*, and in the more recent case of *Paterson*, in 1872 (2 Couper, p. 222), the fact of insanity of near relatives was attempted to be proved, and was authoritatively not allowed. Indeed, a series of decisions had prior to these cases settled the point. The burden of proving insanity rests on the prisoner. Let me, in illustration of what may happen under the existing law, assume he brings forward evidence which leads to grave suspicion of his sanity, but fails to prove it. Can it be doubted that if such a prisoner was allowed to prove that his father and mother both died in a mad-house the grave doubts as to sanity would be changed in the jury's mind to a certainty of insanity? I submit that there is no good and logical ground for excluding such evidence.

By the law of Scotland the evidence of wives and husbands is excluded except where they are injured parties. There is one old and doubtful case, referred to by Mr. Dickson in his work on "Evidence," where a wife was adduced as a witness in a trial of her husband for murder, the defence being that the accused had killed the murdered man caught in the act of adultery with his wife. The reason of its being allowed proceeded apparently upon the assumption that her evidence was the only obtainable evidence with reference to the defence. It is hardly thought that this evidence would now-a-days be allowed, but it occurs to me that in attempting to solve the question of insanity of an occult description,

clearly the best evidence would be that of a man or woman's partner in life, who had been their associates day and night. I submit that, with the consent of both parties, husband and wife should be competent but not compellible witnesses (see Sheriff Dickson's Paper read to Social Science Congress in October 1874, printed in *Journal of Jurisprudence*, 1874, p. 576). I believe in Tierney's case the evidence of his wife would have demonstrated, which no other evidence obtainable could do, that so recently as three years ago there was a return of insanity in his case, probably due to the death of two children at that time. It is clear that this fact, if proved, might have had considerable effect in the jury's mind upon the question of Tierney's responsibility.

There is another point which, I think, deserves consideration. In England there is no public prosecutor. I believe this may frequently be a disadvantage not only to the public but to the accused. Conducted as our Scotch preliminary inquiries and trials are, the only object of the Crown and the other officials entrusted with the duty of prosecution is to obtain the conviction of criminals. It is not their wish and certainly not their duty to try to obtain the conviction of any person believed to be innocent of the charge against him. Hence it was the duty of the Crown, for instance in Tierney's case, to have an examination made into his state of mind, so that if he was not responsible for the murderous act, the charge should not be pressed, although, of course, it was necessary that a trial should take place. Three doctors were employed to do this, the prison surgeon, Dr. Lennox, and the two specialists, Drs. Yellowlees and Robertson, and the latter two gentlemen certainly said everything that could be said in the prisoner's favour. In the paper of Dr. Yellowlees, previously referred to, he submitted that there should not be medical witnesses on both sides when there were doubts as to the prisoner's sanity, but that the Court should obtain the testimony of disinterested medical referees familiar with insanity. I take it that the proper way of conducting preliminary inquiries of murder cases and all other cases anterior to trial, is that the Crown should bring out what is in the prisoner's favour as well as what is against him, and most certainly where doubts as to sanity are started, and medical gentlemen are employed for the purpose of testing that question, they are expected to act as "disinterested medical referees." Such was the way in which Drs. Yellowlees and Robertson conducted their examination of Tierney, and gave their evidence at the trial. I do not believe that in Scotland, however poor a panel might be, and however occult might be his insanity, it is possible that, in our method of conducting preliminary inquiries and trials, he could be brought to trial without a careful examination into the question of sanity. In England, on the other hand, it seems to me by no means impossible that madmen whose insanity is occult, and such as constitute them irresponsible even legally, may be condemned and executed for murder without the fact ever transpiring. In Scotland, be it remembered, prior to trial it is the duty of the

Sheriff to see that an agent is appointed to undertake the defence of a man without means in every case when tried before the Courts of Justiciary ; but in England it is not an unfrequent thing to hear the Judge request a barrister to watch the case for an undefended prisoner accused of murder. It is, I think, a matter also not undeserving of consideration, whether prisoners in England and Scotland accused of murder and destitute of all pecuniary means of defence, should not, subject to reasonable restrictions, have such sums awarded by the Crown as may defray the outlay at least of a proper conduct of the defence.

W. C. S.

### JAMES BOSWELL UPON THE COURT OF SESSION.

WE came across the other day a somewhat curious pamphlet, entitled "*A Letter to the People of Scotland, on the alarming attempt to infringe the Articles of the Union and introduce a most pernicious innovation, by diminishing the numbers of the Lords of Session. By James Boswell, Esq.*" It needed not a very characteristic reference to Samuel Johnson, which it contains, to convince us that this letter was a production from the pen of his famous biographer. There is the same intense and childish simplicity, the same incoherency and irrelevancy which mark the "Life" and the "Journal" of the immortal Bossy, and which we may add contribute not a little to the interest with which they are always read. The subject dealt with in this letter is one not without its attractions to Scottish lawyers in the present day, when a proposal to diminish the number of our senators is so frequently brought forward. Our intention in resuscitating this lucubration of James Boswell, Esq., is not, however, that of supporting the Conservative side of the question by means of his arguments. With all respect to the memory of a most amiable gentleman, we are afraid that his earnest pleadings would now merely serve to render that side ridiculous. But the paper is so curious, and probably so thoroughly forgotten, that we trust we may be pardoned in bringing before the readers of the *Journal* a few specimens of what it contains.

It would appear that about the year 1785 a Bill was actually brought into the House of Commons, having for its object the reduction of the number of the Scottish Judges from fifteen to ten. It was with a view of exhibiting the enormities of this measure, and arousing the enthusiasm of an indifferent public, that the biographer of Samuel Johnson took up his pen. He was not an untried pamphleteer. In the previous year he had directed his attention to a subject of somewhat wider interest, and had written against Fox's East India Bill, when he had, he tells us, the happiness to find his letter received "not only with indulgence, but with a generous warmth of heart," to be gratefully remembered to the latest moment of his life. On the present occasion there was con-



siderable ground for alarm. The Bill in question—although calculated to bring about an important change—was not the scheme of any wild reformer or economizing Whig. It had the approval of those at the very head of affairs, and it was introduced by no less a person than Ilay Campbell, Lord Advocate of Scotland. Boswell seems inclined to believe that this monstrous scheme had originated with some of the Judges themselves, “who, after feasting at Bayll’s French tavern, and raising their spirits high with wine, have formed the lofty wish of reverently paying their court to *Regina Pecunia*.”

In these melancholy circumstances the author looks around for assistance in the defence of the Court of Session in all its ancient integrity. Alas! he has to confess that the country is “at a miserable ebb;” its great families, destitute of public spirit, indolently holding back from their proper place in the Government of the nation. He sees Scotland, as he has seen it before, led by one man, who brings the people to St. James’ and the Treasury “as a salesman drives black cattle to Smithfield.” The great man of that day was, as we all know, Dundas. To him in his despair he turns. For “Mr. Dundas is of a great law race. The family of Arniston has for four successive generations been Judges in our Supreme Civil Court, and for these two last been at the head of it as President. Why then, O why! Mr. Dundas, should you attempt to injure this ancient institution? Are you not afraid that the shadow of your ancestors may disturb your pillow? ‘Be not too bold,’ I entreat you. ‘There are some things which we will bear, and some things which we will not bear.’” But in order to enlighten the English reader, he must explain the peculiar form and Constitution of the Court of Session. Founded upon that constitution, he raises an argument, which, at the period when he wrote, was certainly entitled to some weight. As in Scotland there were then no juries in civil cases, the Court of Session must be viewed, he thinks, as a standing jury for all Scotland. “And will it,” he then asks, “be seriously maintained that fifteen is too large a number when that is considered?” While there were twenty thousand judges in England, Scotland might surely retain its modest number. Boswell was, it may be remembered, an English barrister as well as a Scotch advocate, and he seems to have been favourably impressed with the things south of the Tweed, for he engages to give up his present opposition if only the “British Parliament will give us a grand jury, and juries in civil causes.” He deserves due credit for having suggested another reform which the next generation saw introduced. For he seems to approve of reducing the number of Judges in the Inner House and establishing a set of permanent Ordinaries, as at present. “That,” he says, “I could understand as coming within the power conceded in the Articles of Union, to make regulations.” The argument drawn from the Treaty of Union was, of course, one which was then available, as the *number* of judges had hitherto remained undimi-

nished. That number so fixed was, in his opinion, sacred, and could not be altered at the caprice of a British Parliament.

The son of old Lord Auchinleck knew something of the strength of Presbyterian prejudice, and in his anxiety to enlist all parties and sympathies, he seeks to turn even it to account. "My countrymen, hear me! I accost you with a warning voice—Have a care! I myself do fairly acknowledge that I venerate and love the ancient hierarchy, though, like Whitefield, of whose pious and animated society I had some share, I can communicate with all sincere Christians. But you in general think differently, and your *Kirk*, your Presbyterian Establishment, stands just upon the same ground of security that the Court of Session does." To attract the attention of the country gentlemen, who might be indifferent to the interest of the Kirk, he further urges that if the Articles of Union should be so infringed there might probably be "a prodigious innovation in our land tax." Nothing in short comes amiss to our ingenious advocate. All the nation must be roused to protect the threatened College of Justice. Innovation is in his mind "a very dangerous experiment." The expression of this sentiment leads him to mention Lord Thurlow—before whom, "now that Dr. Johnson has gone to a better world," he bows "the intellectual knee." After a slight digression, which the very name of Johnson is of course sufficient to lead him into, he goes on: "Innovation frightens me, because I never can be sure what will come next. 'Hitherto shalt thou come, but no further, and here shall thy proud waves be stayed!' is not for mortals to say." Again—"I abhor annihilation, and five of our Judges shall not perish if I can prevent it. What in the name of goodness is the motive to this violent measure? Does the country complain that there are too many Judges? No. Do the Judges themselves complain? I trust no." He next tries the effect of a direct appeal to these Judges themselves—to their honesty. They complained of over-work. Were they willing to undertake more, in order to obtain an increase of salary? He waxes indignant over the very thought of such shabbiness—"How injurious is it to imagine they will be like some impudent sluts, who for more wages will undertake to be both cookmaid and chambermaid—*Delicate coalition!* The Lords of Session are or should be gentlemen. Shall we make them a parcel of *scrubs!*"

If necessary to increase their salaries, he is of opinion that that might be done without involving a reduction of their number. But he seems to think that the salaries of these *gentlemen* are at present sufficiently large. "The Lord President," he tells us, "has already £1400 a year; every Ordinary Lord has better than six hundred guineas; and six of their number are also Lords of Justiciary, of whom the Lord Justice-Clerk has £400 a year, and each of the other five has £200 a year." In short they have enough to live upon, "not in rioting and drunkenness indeed, but in grave abstrac-

tion, as becomes their office." And then, too, such able men are willing to take that office. Not that Mr. James Boswell, Advocate, is one of the number. Certainly not. "As for myself," he says, "I do most certainly believe that I am now writing from pure motives, because I have at present no wish for the serious and important office of a Lord of Session. I have a confidence (perhaps too great a confidence) in my abilities; and therefore will try my fortune for some time at least in a wider sphere." His idea of the Scottish Bench is worth recording—"It is a *tontine* for our sons." As for the Bar—"in no country in Europe but Scotland, is the profession of law an *état*, a rank. Many a gentleman with us enters advocate merely to have a feather in his cap, and the prime society of Edinburgh is lawyers. They give the tone; as *arbitri elegantiarum* they rule the theatre. They make balls for the ladies; and once (I suppose to show the prodigious extent of their power) they let the nation know that they could prescribe even a beautiful duchess, the very soul of gay festivity." If the reader wishes to know how low the mighty have fallen, let him compare this account with that in the *London Echo* published the other day.

As his pamphlet draws to an end—he grows more irrelevant and more eloquent. His eloquence perhaps reaches a climax in the following appeal to the mighty Pitt:—"Great sir! forgive my thus presumptuously, thus rashly attempting for a moment to forge your thunder! But I conjure you in the name of GOD, and the KING, I conjure you—to announce, in your own lofty language, that there shall be a stop put to this conspiracy, which I fear might have the effect of springing a mine that would blow up your Administration. Believe me sincere when I now tell you that although I, with all deference, cannot join you in one point, a Reform in Parliament, for the reasons I have given—such is my confidence in your talents and virtues, such my sense of the good you have done, and my hope of the good you are yet to do, that, though not blest with high heroic blood, but rather I think troubled with a natural timidity of personal danger, which it costs me some philosophy to overcome, I am persuaded I have so much real patriotism in my heart that I should not hesitate to draw my sword in your defence."

We cannot say whether it was this eloquence which turned Pitt from his purpose, but this we all know that he forgot to reform Parliament and forgot to reform the Court of Session. The auld Fifteen were left in peace, and the prizes in the lottery of the Bar remained undiminished, although poor Boswell never obtained one.

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#### RECENT DECISIONS IN THE VALUATION COURT.

DURING the last few years there have been several points of interest decided in the Court of Appeal appointed by the statutes

relating to the valuation of lands. We now propose to state them shortly, with some attempt at arrangement. The reports will be found appended to the last volume of Macpherson.

Before, however, dealing with the actual decisions of the Valuation Court, we beg to call attention to an important judgment of the Court of Session. This is the case of *Stirling and Sons v. Holms* (Feb. 28, 1873, 11 Macp. 480.) An attempt was here made to bring under review of the Court of Session certain proceedings of the Judges in the Valuation Court. The judgment recognises the independence of this latter tribunal in the clearest manner. The Lord President at advising observed, "I am quite clear of one thing, that we have nothing to do with the matter any more than if this were a complaint that the Court of Justiciary had pronounced a wrong judgment, or had gone out of their way and violated their own form of process or their Act of adjournals. I think these two Judges sitting under this statute are just as much a Supreme Court as we are sitting here, that their jurisdiction is absolutely privative, and that no other Judge or Court in the realm can interfere with questions arising under the Valuation Act, or rather, I should more properly say, with questions relating to valuations. It is to those two Judges, and to nobody else, that the whole jurisdiction in this matter is committed, and I think we have no jurisdiction to interfere with the way in which they conduct their business." In that opinion the whole of the Judges concurred. Lord Deas put the extreme case of a charge of corruption being made against the Appeal Judges, and seemed to hold that even then the Court of Session could not entertain the case, being inclined to think that impeachment in Parliament was the only remedy competent to the complainers.

There is a decision of the Valuation Appeal Court, relating to the form of the appeal case, which also deserves to be noticed here. In the case of the Bank of Scotland (June 9, 1873), the parties appear to have submitted to the Judges simply a copy of the evidence taken before the commissioners, together with several relative documents, but no special case was prepared. The Act (20 & 21 Vic. c. 58-2), directs the commissioners or magistrates "to state specially and to sign the case upon which the question arose." As this had not been done, the Judges dismissed the appeal because there was not a special case stated in terms of the statute. Turning now to the decisions in the Valuation Court upon the merits, we shall call the attention of our readers, first to those which relate to *dwelling-houses and buildings connected therewith*. As regards such in towns, no point of importance seems to have been settled, the amount at which they are valued depending upon the peculiarities of each case. In the case of a country-house, however, the view of the assessor, that such a mansion was not to be valued at what the mere building unfurnished, and without shootings or fishings, would bring, but at

what it was worth to the proprietor of the estate, seems to have been upheld (*Gladstone*, March 21, 1872). In the case of the Duke of Richmond (April 8, 1867), a finding of the commissioners to the effect that as the rent of a furnished country-house included compensation for the furniture and for keeping up the gardens, it was not in the lease conditioned as the fair annual value of the subjects, and so not to be taken as the measure of value, was overturned. In the case of *Henderson* it was decided that the house upon a farm must not be entered separately from the farm itself in the valuation roll. The object of the double entry in this case would appear to have been with the view of assessing the dwelling-house thus singled out with a higher poor's-rate. A private chapel built within the policies of a mansion-house was not allowed to escape valuation (*Menzies*, March 29, 1873). About the same time it was decided that a parish church and school-house fell to be entered in the roll, although *extra commercium*, upon the ground that the statute required *all* lands and heritages to appear in the roll without reference to the tenure or purpose for which used (*Heritors of New Monkland*, March 21, 1872). Upon the same ground the various University buildings in Glasgow were declared subject to a valuation, although exempted by royal charter and statute from all public and local taxation.

*Farms.*—The rent at which a farm is let is of course the ordinary test of its value. But this will depend upon circumstances. Thus where a farm had been let at a moderate rent to an old servant, the Court sanctioned an entry in the roll based not upon that rent, although all which could be received during the currency of the lease, but upon a detailed valuation by a practical agriculturist (*Kerr's Trustees*, Jan. 28, 1871). On the other hand, in the case of *Bruce*, where the tenant was the son of the proprietor, the rent stipulated was taken as the fair annual value of the subjects. With regard to deductions from rent allowed to a tenant during certain years of his lease, it would appear that in such cases the annual value of the farm is to be stated at the full rent. In one case it was contended that the deduction was allowed for the first period of the lease in order to get the higher rent for the remainder, and but for this the higher rent would not have been got. But this contention was not given effect to (*Udny*, March 21, 1872). When under a lease a tenant had erected certain buildings upon the farm, for which the proprietor became bound to pay at the expiry of the lease, the assessor now valued the subjects independently at what they were worth; but it was held that the rent payable, together with interest at 5 per cent. upon the sums due by the landlord, represented the proper value of farm and buildings taken together (*Skene*, March 14, 1867).

*Manufactories, &c.*—A large proportion of the appeals relate to mills and other works. The most important decision is that in the case of *Annandale and Sons* (March 14, 1867), who objected to the

assessor valuing their paper mills at Beltonford upon an estimated percentage on the cost of erection and furnishing with machinery, &c., and contended that the output was the test of annual value, a view which the commissioners entertained. In that case the opinion of the Judges was as follows: "We are of opinion that the determination of the commissioners is wrong, in respect of its proceeding on the amount of the out-turn, and the value of the works is not to be ruled exclusively either by the amount of actual out-turn or by a percentage on the cost of erection, but is to be estimated according to the rent at which, one year with another, the premises might in their actual state be reasonably expected to let from year to year, having regard to the rent or annual value as assessed of other works of the like description, and taking into account the peculiar advantages or disadvantages of the Beltonford works." In the case of the *Carnbroe Iron Works*, consisting of six furnaces, the value had been ascertained by assuming a certain sum as the value of each furnace, and no deduction was allowed to be made for furnaces which had not been in blast. One element which enters into cases of manufactories is the question of what is to be considered heritable. Thus in one case of a gas work it was decided that while the pipes laid along the streets fell to be valued, the meters belonging to the company did not. In another case, of a flour mill, an attempt was made to restrict the valuation of machinery to the water-wheel and shafts, as the remainder, consisting of stones, dust-screens, elevators, &c., could be removed without injury to the building; but an assessment based upon a valuation of the whole was nevertheless authorized (*Chalmers*, Jan. 28, 1871).

The question of whether a subject comes under the statutory definition of lands and heritages of course often arises in other classes of cases. In the case of the burgh of Dumfries, the assessor valued the bridge over the river Nith on the ground that it was a heritable subject, yielding a revenue to the town. The magistrates on the other hand contended that the bridge was not let—only a right to levy dues which might be levied anywhere between four miles above the bridge and the sea; but the view of the assessor was sustained (Feb. 4, 1871). Again, in the case of *Forbes* (March 20, 1873), a proprietor maintained that the moss upon his estate should not be valued as such (*i.e.* at the considerable revenue derived from the sale of fuel), but at the rent which might be obtained from it as pasture land. The opposite contention of the assessor was however maintained. It has been decided that where thirlage has been converted into annual payments, these payments are not lands and heritages in the sense of this Act (*Duchess of Sutherland*, April 13, 1869).

## THE WORK OF SHERIFF COURTS.

WE have always thought that if the Right Honourable Robert Lowe had been officially spared for even one more session, his attention must, almost necessarily, have been attracted to the waste of paper and ink in connection with the Department of Prisons and Judicial Statistics. If the grim tables could be calculated by machinery (as we understand the almost equally useful tables of figures in the Registrar-General's office are), then some consolation might be found in the thought that the arithmetical mass had cost little more trouble than turning the handle of a barrel-organ. But the sad thing is—all these long columns are the product of human toil, and three-fourths of them are of no use to any mortal under the sun.

The Seventh Report on the Judicial Statistics of Scotland, prepared in terms of the Act 32 & 33 Vic. c. 33, was published in August last. The Report is contained in a folio blue-book of 129 pages, and comprises elaborate tables of the civil and criminal work of the various courts in Scotland during the year 1874. For full information as to the number of offences and offenders, the sentences (if of imprisonment) imposed, the ages and sexes of the parties, the number of times that they had been convicted previously, the prisons they were sent to, how much they each cost and earned there, how their health stood the confinement, the state of their education, how they were instructed in prison, how many escaped and were recaptured, died, became insane, or committed suicide—and for other like numerous interesting and innumerable uninteresting details, we must refer the reader to the Report itself.

We do not here take up the subject of the amount of work done in the Supreme Court. We limit our task to ascertaining the amount of work done in the Sheriff Courts, and by the six busiest Sheriffs and Sheriff-Substitutes in Scotland. Three columns we missed sadly; one with the number of proofs during the year, another with the number of appeals to the Court of Session, and the third with their fate. From beginning to end the statistics give no clue to the number of litigants who avail themselves of the now easy, cheap and speedy appeal to the Supreme Court.

The total number of causes in the Sheriff Ordinary Courts during the year 1874 was 9128, as against 8400 the year before. Of these, 6992 were decided or otherwise taken out of Court in the course of the year, and 2136 remained over. Of the 6992 finished causes, 2123 were decided *in foro*, 3378 *in absentia*, and 1491 were taken out of Court. Of the 2123 litigated cases, 19 were decided by Sheriffs in the first instance, and 715 on appeal; while 1389 were decided by Sheriff-Substitutes, and the decisions acquiesced in. Of the 715 judgments pronounced on appeal, the decision of the

Sheriff-Substitute was in 537 cases approved, in 108 it was reversed, and in 70 it was more or less altered.

Of the 9128 causes before the Sheriff Courts in 1874, 7216 were raised in the course of the year. Of these

Aberdeen and Kincardine had for each	(2)	Sheriff-Substitute	377½
Glasgow	"	" (4)	366
Dundee	.	.	359
Banff	.	.	226
Edinburgh	"	" (3)	222½
Perth	.	.	197

Kinross comes last, with only 6 new cases.

Of the 2123 litigated cases, 1298 had every interlocutor in the cause acquiesced in. As regards 19 of these, this was necessarily so, seeing that from first to last they were before the Sheriffs themselves. Of the 1279 cases decided throughout by Sheriffs-Substitute only,

Dundee had	.	.	160
Glasgow, per Sheriff-Substitute	.	.	65½
Aberdeen, etc.	"	.	57½
Airdrie	.	.	41
Hamilton	.	.	37
Edinburgh, per Sheriff-Substitute	.	.	35

Peebles, with three litigated cases, and Wigtown with one, share the honourable distinction of having had every interlocutor acquiesced in.

But probably the best means yielded by the statistics of estimating the amount of heavy civil work done by the Sheriff-Substitutes, is to be found in the column devoted to judgments *in foro*. Of the 2104 such judgments pronounced by them

Dundee had	.	.	195
Glasgow, per Sheriff-Substitute	.	.	115½
Aberdeen, etc.	"	.	103½
Hamilton	.	.	78
Perth	.	.	67
Cupar	.	.	62

Of the 825 cases decided on appeal, 590 were the subject of only one appeal; 230 were at two, three, four or five stages brought under review. Glasgow and Linlithgow had each a case seven times before the Sheriff; Ayr had one case nine times under appeal; while Banff had two cases which, between them, were twenty-four times before the Sheriff. In all, there were during the year 1173 appeals before the Sheriffs in the course of 825 cases. Such litigiousness will not tend to lessen the notorious delay of Sheriff Court procedure. But with a view to exposure of the other and worse source of delay, we would suggest to Mr. Hill Burton that



in his issue of the Judicial Statistics for 1875, he should have a column in which the number of interlocutors "continuing the motion or case," or "adjourning it till," etc., should be inserted.

Of the 1173 appeals there were before the Sheriff of

Lanarkshire . . . . .	395
Aberdeen and Kincardine . . . . .	106
Forfar . . . . .	85
Edinburgh and Haddington . . . . .	72
Banff, Elgin and Nairn . . . . .	69
Dumfries, Kirkcudbright and Wigtown . . . . .	65

From this it is apparent that the Sheriff of Lanarkshire is the busiest Sheriff in Scotland, and that during the year he decided within two of as many appeals as the five next busiest Sheriffs put together. While, if to the above figures be added those representing the primary judgments *in foro* pronounced by the Sheriffs, it will be found that the Sheriff of Lanarkshire gave 409 decisions, the other five Sheriffs 397 (as before); and the remaining twelve Sheriffs of Scotland, 386. The Sheriff of Peebles had a virgin year—the three judgments *in foro* pronounced by the Sheriff-Substitute having, as already said, been acquiesced in; and oddly enough (though it is almost out of place to mention it here), the like acquiescence was accorded to the three Debts Recovery Decisions of the year. In the Sheriffdom of Argyll no reversals were pronounced during the year. From Fort-William there were no appeals—there having been no judgments to appeal. Tobermory yielded two decrees *in foro* during the twelve months, and Cromarty one. With true Highland combativeness the whole three were taken to appeal, but without success. A dozen towns had from one to five appeals, all of which were dismissed; while Ayr comes highest in the honourable list with seven approved judgments.

In the Debts Recovery Court there were 3682 new cases during the year, as against 3318 in the previous year. 738 cases were decided by Sheriff-Substitutes, and 58 by Sheriffs in first instance. Of the 738 decrees *in foro*, 156 were appealed to the Sheriffs, which, added to 21 appeals remaining undisposed of from 1873, gave them 177 cases to adjudicate on. 161 of these were disposed of, 119 by simple affirmance, while 42 were more or less altered; but how many were reversed, and how many were only to some extent varied, the statistics do not tell. Of the 738 decrees *in foro* 6 were appealed to the Court of Session, but with what result we are not told. Neither are we told, what we should very much wish to know, in how many cases, at the parties' request, a note of the evidence was taken, and in how many not. The value of such a table may be guessed when it is remembered that the days of the Debts Recovery Act are understood to be numbered, and that in consequence the cases now tried under it will be tried in the ordinary Court, where the evidence adduced must be recorded, with the result, of

course, of increasing the labour of the Sheriff-Substitute to the extent of the number of proofs so recorded.

Of the 3682 new cases in this Court—

Glasgow had, per Sheriff-Substitute . . . . .	259½
Dundee „ . . . . .	218
Edinburgh had, per Sheriff-Substitute . . . . .	157½
Paisley „ . . . . .	151
Hamilton „ . . . . .	139
Airdrie and Greenock, each . . . . .	136

As the conclusions of all Debts Recovery summonses are for money, it is interesting to know the amount of the claims. The total claimed in Scotland for causes decided by decree was £58,576—a sum less than that of such a single action as every now and then occurs in the Court of Session. There was claimed in—

Glasgow, per Sheriff-Substitute . . . . .	£3698
Dundee . . . . .	3371
Greenock . . . . .	2785
Edinburgh, per Sheriff-Substitute . . . . .	2662
Airdrie . . . . .	2558
Paisley . . . . .	2503

Of the 796 decrees *in foro* during the year—

Glasgow had, per Sheriff-Substitute . . . . .	69
Dundee „ . . . . .	58
Hamilton „ . . . . .	34
Greenock „ . . . . .	33
Airdrie . . . . .	28
Perth . . . . .	25

Of the 219 decisions pronounced during the year by Sheriffs, the Sheriff of Lanarkshire gave 96; the Sheriff of Midlothian and Haddington, 51; and the other sixteen Sheriffs, 72 amongst them.

In the SMALL DEBT COURT, 43,470 cases were enrolled during the year, as against 42,140 the year previous. But when it is mentioned that in 1870 there were 59,741 complaints brought, the effect of Mr. Anderson's Act abolishing the arrestment of wages under a pound a week may be seen. Of the 43,470 new cases—

Glasgow had, per Sheriff-Substitute . . . . .	3663
Paisley „ . . . . .	2507
Greenock „ . . . . .	1938
Dundee „ . . . . .	1476
Hamilton „ . . . . .	1381
Aberdeen, &c., had per Sheriff-Substitute . . . . .	1361

But as we understand that the Sheriff-Substitute at Hamilton and Airdrie each take an equal share with the Glasgow Sheriff-

Substitute of the cases in the Small Debt Court there, a more correct statement of the work of the various Sheriff-Substitutes would be—

Hamilton . . . . .	3822
Airdrie . . . . .	3553
Paisley . . . . .	2507
Glasgow, per Sheriff-Substitute . . . . .	2441
Greenock . . . . .	1938
Dundee . . . . .	1476

The total amount of money claimed in causes decided by decree in the Small Debt Courts of Scotland during the year was £149,951. Of this sum in claims decided—

Glasgow claimed, per (4) Sheriff-Substitutes	£13,737
Paisley       " . . . . .	7,170
Airdrie       " . . . . .	5,610
Hamilton     " . . . . .	5,310
Dundee       " . . . . .	5,036
Greenock     " . . . . .	4,507

This table is, of course, subject to correction as above, in reference to Hamilton and Airdrie. When it is noticed that nearly £55,000 was the subject of claim in cases terminated by decree in the Glasgow Small Debt Court, it cannot but be inferred that either there is a marked predilection for that Court, or a great dread of the stagnation of business in the Ordinary Court.

The judicial statistics also contain a statement of the business done in the Justice of Peace Courts. It is no part of our task to examine it; but there is one suggestive difference between it and the Sheriff Small Debt Court that is too obvious to escape even the most cursory perusal. We mean the much greater success of pursuers in the Justices' Court. The facilities for obtaining implement of a decree are so great in this Court, that it is almost a subject for surprise that it is not more resorted to. But when once the parties are there, the defenders seem to meet with but small success. This is probably due in great part (in the undefended cases at least) to the obstacles the Act puts in their way; but when these are passed, the chances are still 17 to 2, or  $8\frac{1}{2}$  to 1, against them. Of course the ratio varies in different Courts; but this is the average for all Scotland. In the Sheriff Small Debt Court the chances in favour of the pursuer in a litigated case are 17 to 8, or rather more than 2 to 1. Ill-natured people suggest that this strange contrast is due to the fact that, as the pursuer selects the *forum*, and the Justices are generally guided by their clerk, and as he is paid by fees, and the amount of his fees depends on the number of cases brought, that thereby there is a bias on the clerk's part to advise the Bench in favour of the pursuers. There may be something in this,

but we think its weight is exaggerated. We consider the peculiarity much more due to two other causes—firstly, to the nature of the claims competent in a Justice of Peace Court; and secondly, to the not unfortunate fact that the Bench, in such a Court, do not desiderate the distinct proof demanded by a Judge trained in the strict rules of evidence.

Much of the hard work performed by Sheriff-Substitutes occurs in the disposal of the administrative and miscellaneous work under the Bankruptcy, Lunacy, Registration, Master and Servant (now happily defunct), Public Health, Poor-Law, and numerous other statutes. Amongst the fifty-four Sheriff-Substitutes, we see that 12,700 cases or applications were disposed of during the year 1874.

The criminal returns are very elaborate. Some of the tables, here and there, are interesting and useful; but as it is impossible to ascertain from them the amount of work overtaken by the Sheriffs and Sheriff-Substitutes, they are foreign to our purpose on the present occasion.

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## THE LAW AND LEGISLATION OF THE PAST YEAR.

BY SHERIFF HALLARD.

At the opening of the Sheriff Court of Edinburgh, on 7th ult., Sheriff Hallard gave his customary Address on the Law and Legislation of the past year (or rather of the year which will soon be past), from which we extract the most important passages.

After stating in the outset of his remarks that it was no mere digest of decisions and statutes that he intended to present to his audience, but that he proposed to call attention to certain points of general interest to his procurators as jurists or specially affecting the practice of his own Court, which points he had chosen to "select arbitrarily and discuss freely," the learned Sheriff proceeded thus:—

"The first thing which I propose to do is to try, in your presence, a curious experiment in legislation. From a statute nearly three hundred years old, I select a clause enumerating in the language of the time, certain familiar transactions of ordinary life. Much jurisprudence has been built upon this clause by successive generations of judges; jurisprudence with a special and well-defined outline. Well, I want to make a new statute, and to import precisely that jurisprudence into it; nothing more, nothing less. You perhaps would think it right that the new statute should refer by title and date to the old one, and that it should expressly state the purpose of that reference. My procedure is much simpler and yet more artful than that. In the new statute I merely insert the quaint old enumeration contained in its venerable predecessor—*Quidquid solo inædificatur solo cedit*. Having appropriated the *solum*

I securely believe that I have appropriated the superstructure; nothing less, nothing more. Is my experiment a success?

The answer to that question is to be found in the case of *Sandys v. Lowden*, decided by the Court of Justiciary on the 26th of November 1874. This is a very important case for our guidance. It was there found that an account for goods supplied by an English manufacturer to a Scotch wholesale dealer is recoverable by means of the summary procedure provided by the Debts Recovery Act of 1867.

You remember that the words of the statute defining the class of cases to which its procedure is limited, are an exact transcript of the limiting words in the Triennial Prescription Act of 1579, c. 83, which, by various decisions, has been held not pleadable against a claim arising out of a proper mercantile dealing as distinguished from a mere shopkeeper's account. But the Court held that in a modern statute like that of 1867 "merchant's accounts" could not be read with the restricted meaning which had been attached to "merchantes comptes" in the old Act of 1579.

I need scarcely tell you, what is matter of notoriety, that, at the time of its passing, the new Act was thought to have created a new summary jurisdiction on the precise basis of the old one, with a limit of £50 and an admission of written obligations. "House-maills, men's ordinaries, servants' fees, merchants' accounts, and other the like debts"—there the words stand, modernized in orthography no doubt, but as distinct from the surrounding phraseology in which they are imbedded, as if they had been printed in red ink, and, as the framers of the statute fondly thought, with the judicial interpretation of three hundred years branded in along with them. The bill made its way through Parliament, so quietly that the only speech about it that I have been able to discover in "Hansard" was by the Lord Chancellor, introducing it into the House of Lords. "The present bill," said Lord Chelmsford, "was introduced to meet a wish for the increase of the Sheriff's summary civil jurisdiction as to a certain class of debts, those namely where the creditor was compelled to bring his claim within three years." Wholesale dealings between foreign merchants and ours are certainly not included within that category. But the decision in *Sandys v. Lowden* brings them within the scope of the statute.<sup>1</sup>

Is remedial legislation a failure when, on its practical application by the Law Courts, it is found to go farther than the Legislature intended? Perhaps not; but still it is desirable that the Legislature should know precisely what it is doing, and should not do more when it intends to do less. Be that as it may, I own myself one of those who would not regret the disappearance of this intermediate jurisdiction, this *tertium quid*, which was then introduced between the ordinary jurisdiction of the Sheriff and his Small Debt Court.

<sup>1</sup> For another view of the question here discussed, see *ante*, vol. xviii. p. 660.

An increased field for the latter, with due provision for professional aid and for appeal on a stated case, is a very different and a much better thing, which may come to pass some day.

The next case on my list is *Auld v. Shairp*, which occupied the attention of the Court in December, in May, and in July last. No case more notable than this one is to be found on the rolls of our supreme tribunal during last session. You will remember it as an action against the Principal of the United College of St. Salvator and St. Leonards in St. Andrews, raised by the widow of an unsuccessful candidate for the Humanity Chair. Lawyers will read the story of this litigation with profit; to my mind it touches a public right and a public interest of no common order.

I briefly recapitulate the facts. Mr. Shairp was Professor of Humanity in the United College. Being appointed Principal, he intimated to the patron of the Humanity Chair his intention of resigning it. The patron promised the chair when vacant to Dr. Auld, Classical Master of the Madras College or Burgh School. But it did not become vacant. Principal Shairp, viewing Dr. Auld's proposed appointment as a bad one for the interests of the University, did not make way for him by resigning the chair. He retained possession in order to keep him out. He did more; he wrote a letter to the patron, of which the gist is contained in the following sentence which I quote from it:—"It is a well-known fact here that Dr. Auld, though an amiable and respectable man, has not proved himself an energetic or efficient teacher, but has notoriously failed in his present post as classical master in the Madras College, which is the name of our burgh school." This letter was dated March 1869. Dr. Auld died two years afterwards, never having got the chair. The action was one of damages for slander at the instance of his widow and executive, and damages for unlawfully retaining the chair to the exclusion of the deceased.

It is better to clear the ground at once of this latter alternative. The Court held that the patron's promise to appoint gave the promisee no title to claim damages from the titular in possession, who, lawfully or unlawfully, continued to occupy. It was a mere expectancy, at any time defeasible by the patron. But leaving this, I hasten to consider what fate befell the question of slander.

In the procedure of pleading there are some things which recall the procedure proper to the art of war. A defender may join at once in open fight with his antagonist; or he may raise up first one palisade or earthwork, and then another, which the foe must clear before the hand-to-hand encounter can begin. Unfortunately—most unfortunately, as I humbly think for the public interest—this last was the system of defence adopted in *Auld v. Shairp*. The first outwork presented to the assailant was a certain Roman Law maxim, not much heard of in these times: *Actio personalis moritur cum persona*. It was pleaded that Dr. Auld being dead, his right of action died with him. Pleasant it is

to revel in the institutes and pandects of Justinian; pleasant and sometimes effective it is to quote the commentary of Vinnius upon the one and of Voet upon the other. But although maintained by the respected authority of Lord Ormidale, I cannot help feeling thankful, for the sake of the public interest involved, that this outer line of defence was carried by the enemy notwithstanding the authorities *utriusque juris* with which it was buttressed. The next fence to be cleared was privilege. Now the proper arm to assault a position protected by privilege, as we all know, is an allegation of malice. Malice was alleged accordingly; a plea out of which arose much delay, and the expense of a two days' trial. It is difficult to read the evidence without an impatient feeling that, for the most part, it does not touch the issue. The ethics and practice of testimonial-giving and of testimonial-using were a mere incident, without, as it would seem, any practical bearing upon the result. But what I insist upon is this, that the question for trial was not whether Dr. Auld was a good teacher, but whether Principal Shairp was, in the exercise of his own honest and *revised* judgment, entitled to call him a bad one? "What is merit?" once said a distinguished Statesman, more alive to the practical exigencies of the hour than to the loftier, but more abstract, claims of moral principle—"What is merit but one man's opinion of another?" It is a signal advantage of this definition that it applies with the same irresistible point to demerit also. Could Principal Shairp then not bring his contribution to the merits or demerits of Dr. Auld as a candidate without peril of an action of damages? The assertion of *notorious* failure as a teacher indicated the only competent, indeed the only possible tribunal; I mean public opinion.

The defence prevailed in the long run; to my mind its failure would have been nothing else than a public calamity. Yet the result does not leave me without some feeling of disappointment. Remember that the private worth of Dr. Auld never was in question. His personal character was by Principal Shairp and by all men proclaimed to be without a stain. A charge against his rectitude or morals would have raised a question of *veritas convicti*, would have been in many ways a disturbing element which was happily absent. But holding one public situation, he desired another of much higher dignity and usefulness. Here lies the point; was it not lawful, not merely for one man, but for all men, rightly or wrongly, to say: Do not let him have the higher office, he has notoriously failed in the lower. He has not handled his regiment efficiently as a colonel; do not make him a general of division. He has not ruled well over one city; do not make him a ruler over five cities? Private character being out of the debate, I cannot help thinking that the candidate for a University chair challenges the hostile criticism of the whole world, just or unjust, by whatever motive actuated, and from what quarter soever it

may come. It is not for the interests of the higher education in our country that such criticism should be fettered by the terrors of a possible litigation. It ought, in that respect, to be absolutely and notoriously free. In the present case there was an opportunity for declaring such freedom. That opportunity was not taken. Principal Shairp owes his legal immunity to privilege; the privilege of his position as head of the college in which the appointment was to be made. But under this decision it still remains doubtful whether any one else, a newspaper for instance, could lawfully say what he said. To those of you who may agree with me, it is some consolation to find this passage in the opinion of Lord Neaves:—"An aspirant to a position like this (the Humanity Chair) lays his character and qualifications open to criticism by all who have a natural and legitimate interest in the appointment." And these, I venture to add, are nothing less than the whole community. The privilege, or, if you will, the duty of Principal Shairp was contained within the common right of all.

We light upon a very singular spectacle in the next case which I have to present before you. The scene is laid within the parochial school of Kelso, which is also the grammar school. You see there a door held shut against two delegates of the school board, who are approaching on a mission of inspection, without notice to the schoolmaster, and without his leave. Shall the delegates get in, or shall the master keep them out? In this conflict of forces, the one *ab intra* and the other *ab extra*, which of the two has in law the title to prevail? This was the question which the Sheriff Court of Roxburghshire was declared incompetent to solve by way of interdict. I refer to the case of the *School Board of Kelso v. Hunter*, decided on 18th December last.

You will observe that there was here no question of heritable title, nor of status, nor of reduction; but there was, it seems, a question requiring preliminary settlement by decree of declarator. No doubt was entertained by the Court that the school board were entitled to visit the school at all times, including school hours, in order to see whether proper accommodation was provided; as, for example, whether the building was in good repair, or the desks and forms in a satisfactory condition. But to visit the school for the purpose of inspecting it in the sense of superintending the teaching and examining the scholars was quite a different thing. There might be such a right in the school board, but it was not clear on the face of the statute. It required to be ascertained by declarator. Till it was so ascertained, the Sheriff Court had no power to interfere by way of interdict.

This decision is law for us, and it may be appealed to as a precedent in other than school board cases. It is our bounden duty to study it, because it is our bounden duty to obey it. I humbly confess that I have found it perplexing. The competency of the pro-



cedure; and of the Court, was made to turn on the difficulty of the question at issue. If the school board's right was clear on the statute, the process and the Court were competent. If the right was not clear, the process and the Court were incompetent. Can a line be drawn between what is clear in such matters, and what is unclear? Even on this preliminary point judges may differ. In this very case they differed. Three thought it was not clear; one thought it was clear. The majority were of opinion that the school board's right to make these surprise visits in order to test the educational efficiency of the school was, as matter of interpretation, doubtful. Lord Ardmillan, on the other hand, thought that the right claimed by the school board had been clearly given to them, and could only be shut out by a system of interpretation sometimes applied to the fetters of an entail, and so severe as to be rightly termed malignant. One of the perplexities in this case is that his Lordship nevertheless concurred in the decision whereby the school board were found wrong in seeking to vindicate their right by interdict in the Sheriff Court, and were made to pay the whole costs of the litigation. To return to the scene which I presented at the outset; the school-master, until a decree of declarator be obtained against him, may triumphantly keep his school-door shut against the delegates of the school board sent on a properly educational mission without notice to him and without his leave; provided always he was in office at the passing of the Act. If his title be of a later date and proceed from the school board itself, any threat of opposition on his part may be speedily silenced by a threat of dismissal.

We all know that in practice doubtful questions of right arise which lawyers consider unfit for the sharp and rapid method of an interdict, and which they prefer to try in what they call the more deliberate form of a declarator. One may be permitted humbly to wonder that a school board's right to visit educationally a school under their management should have been placed in that category. But the practical lesson for us is that the jurisdiction of interdict in the Sheriff Court is one which the Supreme Court will narrowly watch and *in dubio* restrain. We must walk warily in the use of that process, lest we be regarded as abusing it; our path here is beset by snares and pitfalls, and every step in it is full of peril.

The school board cases will form an important group in the new volume of Law Reports. But their interest is fleeting. Only the old schoolmasters, those, I mean, who were in office at the passing of the Act, have anything like an independent position in questions which may arise between them and their school boards. The board may dismiss an old schoolmaster, on the ground of fault duly set forth in the sentence of dismissal, which sentence is not examinable on its merits. But, besides this allegation of fault, there must be a prior report by a Government inspector and a subsequent sanction by the Board of Education. A new master holds his office at the pleasure of the school board by whom he is appointed.

Regard to the vested interest of the old master led to this difference of tenure. For the sake of the great social interest which he represents, I regret that the same limited measure of independence has not been conceded to the new master. No central or superior authority protects him from local animosities or local prejudice if these should make themselves felt in the action of the school board.

Section 90 of that code of railway law known as The Railways Clauses Consolidation Act enables a railway company to detain and sell carriages and goods in their hands belonging to any one liable to pay "tolls" due on other carriages and goods that have passed out of their possession. A demand for such tolls on the one hand, and a failure to pay on the other, is all that is needful to set this clause in motion. In England it was construed as applying only to tolls due for the use of the line. But with us it is quite understood to apply to rates due to the company as common carriers. If goods consigned to you as purchaser lie for delivery to you at the railway station, there is not only a lien at common law on each parcel for the carriage rate of that parcel, but also, under the above enactment, the company can detain all these parcels of yours now in their hands till you settle your arrears of previous carriage.

So far, so clear. But suppose the arrears are due, not by you but by your consignor, or seller, at the other end of the line. You have either bought the goods, or accepted bills for them; you are a buyer, or at least an onerous consignee. Can the railway company detain against you in security of prior carriages due by the consignor with which you have no concern?

This is the question which was tried in *Peebles v. Caledonian Railway Company*, and decided on 20th January 1875. The Court, affirming the judgment of Lord Young, found the claim of the railway company untenable against the onerous consignee, and held that the foregoing enactment did not apply.

The company had another and a more precise and positive plea in bar. They did not merely rely on the application of that general provision of railway law to their case. A bargain had been made with the consignor; and they pleaded that bargain against the consignee. They allowed the consignor a month's credit for freight, and stipulated that all goods in their hands consigned by him should be subject to a general lien for such arrears. There was a question, which I purposely neglect, as to the proper authentication of the contract. But the plea of general lien by stipulation was not more successful than the other. In a question with an onerous consignee, the Court held that this agreement was neither just nor reasonable. They therefore voided it under the powers conferred by the Railway and Canal Traffic Act of 1854.

The commerce of the country may be congratulated on that decision. Even the railways need not complain if the practice of

giving credit for carriage rates be thereby discouraged. Lord Young tells us that he has stated his opinion, and the grounds of it, at a length somewhat disproportionate to any difficulty he experienced. It is fortunate that his clearness and confidence in disposing of the pleas submitted by the railway company did not restrain him from giving us a full exposition of his views, which all who read it will acknowledge to be an eminently valuable contribution to this department of jurisprudence." . . . The next and last case commented on by the learned Sheriff was that of *M'Donald v. M'Donald*, decided on 25th May last.

"Where married persons live in family together, and the wife, complaining of her husband's cruelty, and suing him for interim aliment, leaves his house while the action is in dependence, the Sheriff has no jurisdiction,—in respect of the husband's proved cruelty together with the separation so made in fact by the wife *pendente processu*,—to grant her a decree of interim aliment. If there be a case for separation and aliment, the remedy must be sought in the Court of Session.

This case, on the facts, is not a strong one for my purpose; for this husband, it seems, gave his wife a thrashing that she had done much to earn. But it is manifest that this circumstance does not touch the legal point of the decision. She might have deserved nothing but kindness; she might have been a mere victim of cruelty—she would have had all the stronger case to go to the Court of Session,—but it would have fared no better with her process in the Sheriff Court. I will therefore assume her to have been an innocent victim. This being premised, I ask you in the next place to contrast that decision with the case of *Smith v. Smith*, June 11, 1874, in which it was held that a wife whose husband has deserted her may raise action for interim aliment in the Sheriff Court.

You see that the interest of these two decisions to us is the light which from opposite points they throw on a very important yet delicate branch of Inferior Court jurisdiction. And the lesson we are taught I read thus:

If a husband deserts his wife, the Sheriff Court is open; if he beats her till she flies out of doors, the Sheriff Court is shut. An offer to receive her into the same happy domesticity as before, does not, in the latter case, make any difference; the Sheriff must not interfere even for the purpose of an interim arrangement pending a final determination of the question between the spouses in the Court of Session. The consistorial element is present in the latter case, not in the former. In Lanarkshire, I am told, the Sheriffs were in the habit of neglecting this distinction. They have been set right by the judgment pronounced in *M'Donald v. M'Donald*. As in the mishaps of our friends there is, according to a certain moralist, an element of pleasure for us; so in their errors there is, or ought to be, an element of utility. Let us profit by their experience and guide our footsteps accordingly.

Whether these contrasted cases disclose an anomaly requiring legislative redress is a point on which I cannot hold myself to be either a competent or a safe guide. My heretical proclivities tend to very considerable innovation in this branch of jurisprudence. I would not be afraid of sending, in some cases, the consistorial element even into the Police Court. If a husband be convicted then of repeatedly and habitually ill-using his wife, why should not this addendum be made to the usual sixty days' hard labour,—viz., a decree of separation with obligation to aliment? Consistorial or not consistorial, this award would have no mean power as a deterrent. It might abate somewhat that shameful plague of wife-beating which infests our country and dishonours our time."

Reference is next made to the Statutes of 1875, at least to those of most interest to lawyers.

"These are few, and rather involve matter of detail than of general principle. For example, you will turn up your copy of the Bankrupt Act of 1856, and draw your pen through section 122, as to the preference to be given to the wages of clerks, shopmen, and servants employed by the bankrupt. The period before bankruptcy to which such preference now extends, is enlarged to four months. Nothing is said as to the annual amount of wages, and the preferential sum is limited to £50. Workmen's wages are to have a two months' privilege.

There is a new statute made to relieve the widows and children of intestates of much useless expenditure in obtaining confirmation, where the estate does not exceed £150. A short form of inventory and relative oath is provided, upon which a writ is issued in the commissary's name, wherein decerniture and confirmation are combined into one. The whole machinery, which is simple, clear, and practical, is committed into the hands of the commissary clerk, who is invested with special powers for that purpose. One does not see why this simple measure of relief should be limited to the case of intestates; nor, where there is no dispute, to the sum of £150. Assuredly it is a move in the right direction.

An important measure, of which I own I shall watch the operation with much interest, is the Act to alter and amend the Law relating to Appeals in Summary Prosecutions before Inferior Judges in Scotland. Prosecutor or prosecuted may have redress against an adverse decision, if erroneous in point of law, on a case to be stated by the Judge for the opinion of the Court of Justiciary in a criminal prosecution, or one of the Divisions of the Inner House if the cause be civil. Is the remedy limited to a pure question of law? The words of the statute are, that the inferior judge shall "state and sign a case, setting forth the facts and the grounds of such determination for the opinion thereon of a superior Court of law." May I, under these exacting words, state a case in this form: "I held this and that to be proved, and inferred therefrom the guilt of the accused. The question for the opinion of the

Court is, whether that was a sound inference." I doubt whether this statute, remedial as it is, will receive such a liberal construction. I would be glad to think it might. For I strongly believe that there is no better security for the administration of justice in our inferior tribunals than the Judge's consciousness that all he does is liable, in some measure at least, to the immediate review of the Supreme Court."

After a lament for the disaster which happened to what many have regarded as—

"That fatal and perfidious bark,  
Built in the eclipse, and rigged with curses dark"

—the Sheriff Court Bill of last session, the Sheriff expressed his delight that the captain of that ship, who last summer was thought to have been tired of the strife and intended to take his ease on the Bench, is about to tinker up the old craft and set to sea again next session

Luctantem Icaris fluctibus Africum  
Mercator metuens, otium et oppidi  
Laudat rura sui ; mox reficit rates  
Quassas.

Mr. Hallard concludes his address with a just and appropriate tribute to the character and public services of his friend and late colleague, Mr. Campbell, who, after a long period of absence from ill-health, resigned his office of Sheriff-Substitute of Midlothian:—

"I cannot bring these words of mine to a close without alluding to a change in this Court, long impending and now completed. Mr. Campbell, my friend from boyhood, and my colleague in this Court for nearly ten years, is no longer one of the Sheriff-Substitutes of Midlothian. An infirmity which affects only his physical frame, leaving his intellectual part as strong and clear as ever, has rendered this step necessary. For him the evening of life has begun somewhat early in the afternoon. We shall all miss that perfect temper and courtesy, that full and solid legal learning, and above all, that rare soundness of judgment which added a special value to all those qualities whereby he was endeared to his friends, and marked out for a large measure of public respect. There remain to him many blessings, which some of his friends have lost; may he enjoy them long!"

### SPIRITUALISM AND JURISPRUDENCE.

DR. FRANCIS WHARTON, the author of the well-known "Treatise on the Law of Homicide in America," has an article on this subject in *Lippincott's Magazine* for October, in which he writes as follows of psychological homicides, after treating of the spiritualism of the seventeenth century:—

"Blackstone (1765), in his *Commentaries*, speaks with even greater scepticism, and refers with satisfaction to the then recent

repeal by Parliament of the witchcraft statutes of James I. and Henry VIII. The lowest point of subsidence, however, was reached at the beginning of the present century. This is expressed in the following passage in Mr. Edward Livingston's penal code:— 'It (homicide) must be operated by some act; therefore death, although produced by the operation of words on the imagination or the passions, is not homicide. But if words are used which are calculated to produce, and do produce, some act which is the immediate cause of death, it is homicide. A blind man or a stranger in the dark directed by words only to a precipice where he falls and is killed, a direction verbally given to take a drug that is known will prove fatal, and which has that effect, are instances of this modification of the rule. Homicide by omission only is committed by voluntarily permitting another to do an act that must, in the natural course of things, cause his death, without apprising him of his danger if the act be involuntary, or endeavouring to prevent it if it be voluntary.' (Livingston's Works, New York, 1873, ii. 126.) With more or less closeness the same limitations have been applied by the courts of England and of the United States.

"Yet, natural as was this reaction from the hyper-spiritualism of the seventeenth century, it soon began to be felt that the entire ignoring of moral causation in jurisprudence was as unphilosophical as was its exaggeration. Do not some men often acquire such power over others as to make mere brute instruments of them? We may reject the term 'moral,' and insert 'nervous;' and ask whether it is not admitted that the nervous system may be acted on for criminal ends, and then inquire whether such action is not indictable.

"Among the first to reopen the discussion was Lord Macaulay, in his report on the Indian code, published in 1838. Macaulay, it will be remembered, when in the maturity of his powers, after having distinguished himself by a series of brilliant and exhaustive speeches on Indian affairs, was appointed Secretary of the Board of Indian Control, which post he resigned in 1834 for the purpose of going to India as a member of the Supreme Council. He accepted the office of legal adviser to that body, assuming as his special duty the preparation of a code, for which he prepared himself by a thorough study of jurisprudence, both philosophical and practical. It has been the fashion to speak of his report as speculative, but this is a great error, for there is no writer who has applied the inductive process of investigation to a wider field, or who has more accurately as well as more philosophically scanned, not merely the adjudications of the courts on criminal jurisprudence, but the conclusions of those European thinkers who have treated the subject psychologically as well as juridically. So far as concerns the topic immediately before us, Macaulay argues with equal earnestness and eloquence

that penal responsibility attaches to a homicide produced by psychological force. 'There is undoubtedly a great difference,' he says, 'between acts which cause death immediately, and acts which cause death remotely; between acts which are almost certain to cause death, and acts which cause death only under very extraordinary circumstances. But that difference, we conceive, is a matter to be considered by the tribunals when estimating the effect of the evidence in a particular case, not by the Legislature in framing the general law. It will require strong evidence to prove that an act of a kind which very seldom causes death, or an act which has caused death very remotely, has actually caused death in a particular case. It will require still stronger evidence to prove that such an act was contemplated by the person who did it as likely to cause death. But if it be proved by satisfactory evidence that death has been so caused, and has been caused voluntarily, we see no reason for exempting the person who caused it from the punishment of voluntary culpable homicide.

"Mr. Livingston, we observe, excepts from the definition of homicide cases in which death is produced by the effect of words on the imagination or the passions. The reasoning of that distinguished jurist has by no means convinced us that the distinction which he makes is well founded. Indeed, there are few parts of his code which appear to us to have been less happily executed than this. His words are these: 'The destruction must be by the act of another; therefore self-destruction is excluded from the definition. It must be operated by some act; therefore death, although produced by the operation of words on the imagination or the passions, is not homicide. But if words are used which are calculated to produce, and do produce, some act which is the immediate cause of death, it is homicide. A blind man or a stranger in the dark directed by words only to a precipice where he falls and is killed, a direction verbally given to take a drug that it is known will prove fatal, and which has that effect, are instances of this modification of the rule.'

"This appears to us altogether incoherent. A verbally directs Z to swallow a poisonous drug; Z swallows it and dies; and this, says Mr. Livingston, is homicide in A. It certainly ought to be so considered. But how, on Mr. Livingston's principle, it can be so considered, we do not understand. 'Homicide,' he says, 'must be operated by an act.' Where then is the act in this case? Is it the speaking of A? Clearly not, for Mr. Livingston lays down the doctrine that speaking is not an act. Is it the swallowing by Z? Clearly not, for the destruction of life, according to Mr. Livingston, is not homicide unless it be by the act of another, and this swallowing is an act performed by Z himself.

"The reasonable course, in our opinion, is to consider speaking as an act, and to treat A as guilty of voluntary culpable homicide if by speaking he has voluntarily caused Z's death, whether his words

operated circuitously by inducing Z to swallow poison or directly by throwing Z into convulsions.

"There will indeed be few homicides of this latter sort. It appears to us that a conviction, or even a trial, in such a case, would be an event of extremely rare occurrence. There would probably not be one such trial in a century. It would be most difficult to prove to the conviction of any court that death had really been the effect of excitement produced by words. It would be still more difficult to prove that the person who spoke the words anticipated from them an effect which, except under very peculiar circumstances and on very peculiar constitutions, no words would produce. Still, it seems to us that both these points might be made out by overwhelming evidence; and, supposing them to be so made out, we are unable to perceive any distinction between the case of him who voluntarily causes death in this manner, and the case of him who voluntarily causes death by means of a pistol or a sword. Suppose it to be proved to the entire conviction of a criminal court that Z, the deceased, was in a very critical state of health; that A, the heir of Z's property, had been informed by Z's physicians that Z's recovery absolutely depended on his being kept quiet in mind and the smallest mental excitement would endanger his life; that A immediately broke into Z's sick room, and told him a dreadful piece of intelligence, which was a pure invention; that Z went into fits and died on the spot; that A had afterwards boasted of having cleared the way for himself to a good property by this artifice. These things being fully proved, no judge could doubt that A had voluntarily caused the death of Z; nor do we perceive any reason for not punishing A in the same manner in which he would have been punished if he had mixed arsenic in Z's medicine.

"Mr. Fitzjames Stephen, who has taken a leading part in the formation of a civil code for India, was in 1873 so much impressed with the imperfection of the English law of homicide in this and other respects that he took an active part in the appointment of a committee of the House of Commons for the revision of that law. He was examined as a witness before that committee, and the following is part of his testimony:—

"Then the other point in that section, which is an alteration of the existing law, is one which various persons who have seen the Bill have remarked upon to me—namely, "It is immaterial whether the Act by which death is caused did or did not inflict actual injury on the body of the person killed." Now, with regard to that there are various remarks to be made. In the first place, I think that some of those who favoured me with remarks upon the subject, one learned judge in particular, hardly observed that this definition is not a definition of any crime, but is a definition of the act of killing, and if the act of killing were not accompanied by any of the intentions that are stated in the later sections of the bill, the mere fact that a man was killed by some cause which did not inflict



actual injury on the body of the person killed would not constitute any crime.

"That answers some objections which may be raised to it, but I would go further by pointing out what the real nature of the rule is, and what I understand to be the principal authority for it. The great authority for the rule (it is repeated of course by other persons of less note in different shapes) is to be found in Hale's "Pleas of the Crown," p. 429, and is in these words: "If any man, either by working upon the fancy of another, or possibly by harsh or unkind usage, puts another into such passion of grief or fear that the party either dies suddenly or contracts some disease whereof he dies, though, as the circumstances of the case may be, this may be murder or manslaughter in the sight of God, yet *in foro humano* it cannot come under the judgment of felony, because no external act of violence was offered whereof the common law can take notice, and secret things belong to God; and hence it was that before the statute of 1 Jac. I. c. 12, witchcraft or fascination was not felony, because it wanted a trial, though some constitutions of the civil law make it penal." Upon that passage I would observe that in the first place I do not think it goes by any means to the length to which modern writers have been apt to carry it—namely, that unless you could show some specific force actually injuring some bodily organ, there can be no murder, but it puts it on this—first, that it is a secret thing; secondly, the passage ends by saying that for this reason witchcraft is not felony. I rather incline myself to think that this is the explanation of the rule. There were very good reasons, one can quite understand, why, when everybody believed in witchcraft, humane people should not wish to extend trials for witchcraft, and should say, "There is no actual and obvious injury done by these witches, and therefore we will not go into that."

"But if you accept that principle in its fulness you arrive at almost monstrous results, and I will just mention a case or two to the committee. I may observe that what I am saying is said with much greater force by Lord Macaulay, in a report which he wrote upon the Indian Penal Code, at the time when they considered this question: he has gone at great length into it, but I will just put a case which I have in my mind. Suppose a man wants to murder his wife, and suppose that she is ill, and the doctor says to him, "She is in a very critical state, she has gone to sleep, and if she is suddenly disturbed she will die, and you must keep her quiet." Suppose he is overheard repeating this to another man, and saying, "I want to murder her, and I will go and make all the noise I possibly can for the purpose of killing her." You may imagine the evidence to be quite conclusive on that point; he goes into the room, makes a noise, and wakes her up with a sudden start, and frightens her, and she does die according to his wish. It seems to me that that act is as much murder as if he had cut her throat. Or suppose a case like this: a man has got aneurism of the heart, and his heir,

knowing that, and knowing that any sudden shock is likely to kill him, suddenly goes and shouts in his ear, and does so with the intent to kill him, and does so kill him. It seems to me that if that man is not punished it is a very great scandal, for the act is just as bad as if he had killed him in any other manner. The fact is, that the objection to treating such cases as either murder or manslaughter arises from this, that in a general way, in such a case as unkindness, or many other cases of the same kind, you could never prove that the man intended either to kill or cause harm, or that it was common knowledge that there would be harm or death caused; and, therefore, in all those cases in which you would not wish to punish, the person would escape on account of the difficulty of proof. The only cases in which you would ever want to punish would be cases in which the difficulty of proof, by some such means as I have suggested, would be got over.

"With this we may consider the remarks of Judge Erskine (a son of Lord Chancellor Erskine), some years since, when charging a jury in a homicide trial: 'A man may throw himself into a river under such circumstances as render it not a voluntary act—by reason of force applied either to the body or the mind. It becomes then the guilty act of him who compelled the deceased to take the step. But the apprehension must be of immediate violence, and well grounded, from the circumstances by which the deceased was surrounded; not that you must be satisfied that there was no other way of escape, but that it was such a step as a reasonable man might take.' *Rex v. Pitts*, 2 C. & M. 284. But the last qualification cannot be sustained. No one can doubt that it would be murder to entice an insane man over a precipice, and thus to kill him. Indeed, as we shall see, what is done through an insane agent is regarded as done directly by the principal.

"So much, then, for the authorities in cases where one man kills or hurts another by acting on the latter's nervous system in such a way as to cause death or sickness. We turn to the other phase in which the question before us presents itself; and here the law is equally emphatic. *He who commits a crime through the agency of an insane or unconscious agent is the principal in the commission of the crime.* This proposition is too plain in principle to require argument in its support; and it is accepted by the courts whenever it is mooted. We have a pertinent illustration in a trial before Lord Denman, C.-J., in 1838. The evidence in this case was that the defendant, Thorn, claimed, either fraudulently or honestly, to be possessed of supernatural powers, and that in union with a small body of adherents he traversed the country, professing to work miracles. How far he was the tool of his associates, or how far they were really impressed with the truth of his mission, could not be absolutely determined. But on the evidence certain things were clear; a person claimed to possess supernatural powers, and committed homicides

in exercise of his supposed mission, and certain other persons encouraged him in the commission of these homicides. The persons so aiding Thorn were put on trial for these homicides, the indictment charging them first as accessories to Thorn, and then as principals. Lord Denman met the case boldly on the principle that he who acts directly through an insane agent is primarily responsible. 'It is not an opinion which I mean to lay down as a rule of law to be applicable to all cases,' he said, 'that fanaticism is a proof of unsoundness of mind; but there was in this particular instance so much religious fanaticism, such violent excitement of mind, such great absurdity and extreme folly, that if Thorn was now on his trial it could hardly be said from the evidence that he could be called upon to answer for his criminal acts.' 'If these persons . . . were aware of the malignant purpose entertained by Thorn, and shared in that purpose with him, and were present, aiding, abetting, and assisting him, in the course of accomplishing this purpose, then no doubt they are guilty as principals on this second count' (*Rex v. Mears*, 1 Bost. Law Rep. 205, reported under the name of *Rex v. Tyler*, in 8 C. & P. 616). In other words, here is an insane agent, claiming to exercise supernatural powers, with whom, if not on whom, the parties accused are operating; this insane agent, when under their power, commits a crime; for this crime they are the persons directly responsible.

"It remains to apply the principles just stated to spiritualism. I put out of the question those professed spiritualists who are conscious impostors. Such persons, if they obtain money by the exercise of such imposition, are indictable under the statutes which make penal the obtaining money by false pretences. See to this effect, *Rex v. Giles*, L. & C. 502; 10 Cox's C. C. 44; *State v. Phiper*, 65 N. C. 321; Whart. C. L., 7th ed., § 2092a. Of this principle we have a vivid illustration in a late trial in France, as narrated in the following letter by the Paris correspondent of the London *Daily News*: 'A strange trial has taken place before the Correctional Tribunal of Paris, and it has resulted in the conviction of certain "Spirit Photographers" for swindling. Buguet, a photographer, of No. 5 Boulevard Montmartre, allied himself with M. Leymarie, the editor of the *Revue Spirite*, who wrote about him and published fac-similes of his portraits, and with an American named Firman, from whom he learned the art of persuading people that he could, if they only willed strong enough, conjure up and photograph a likeness of any deceased relation or friend. For a long time the firm did a large business. Twenty francs was the ordinary fee, but many wealthy people voluntarily paid two thousand, three thousand, and even four thousand francs. Never was fraud more clearly proved. The operator's spirit-box was produced in court; it contained hundreds of portraits of men, women, boys and girls of all ages. When customers came desiring spirit portraits, a young lady, who acted as cashier, adroitly engaged them in conversation in the waiting-room, and generally contrived to find some indications of the physiognomy

of the person whom it was desired to evoke. Then one of the numerous heads was selected, stuck upon a doll dressed up in muslin, and a hazy portrait of a spirit was produced from it. Buguet guarded himself by saying he could never guarantee a likeness, because much depended on the strength of faith of the applicant; and moreover, spirits were very capricious, and sometimes when you called for one another would come; but in very many instances the force of imagination was so strong that his dupes believed they saw the portraits of their relations. They burst into tears, fell upon their knees, kissed the photographs, and were profuse in expressions of gratitude to the professor, as well as lavish of gifts to him. Notwithstanding the palpable exposure of the imposture in open court, a host of respectable witnesses, including a Russian marquis, the Comte de Bullet, Mr. Sullivan, formerly United States minister at Madrid, two French colonels, and several ladies, appeared for the prisoners, and, undismayed by the sarcasms of the presiding judge, protested that they really had seen unmistakeable portraits of deceased relatives. The eminent counsel for the defence, M. Lachaud, spoke for two hours, and alluded to Moses, Isaiah, Tertullian, and other authorities on spirits. The Court, however, thought the charge fully proved, and sentenced Buguet and Leymarie to one year's imprisonment, and Firman to six months. It is curious that the prosecution was not instituted on the complaint of any customer, but spontaneously by the police for reasons not explained.

"This is good law; and there is no question that a similar conviction would follow prosecutions in the United States, conducted with equal intelligence, against not only the spirit photographers, but all concerned in obtaining money by impostures such as those of Katie King and her abettors.

"But this does not touch the case of those who honestly apply what is called spiritualistic force. As to such persons we may hold: 1. If in consequence of their action on another, such other person injures himself, they are penally as well as civilly responsible for the injury. 2. If they obtain control over the will of another person, so as to make him their absolute agent, they are both penally and civilly liable as principals for what he does under this constraint."

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### The Month.

*The New Judge.*—Mr. Andrew Rutherford Clark, Q.C., LL.D., Dean of the Faculty of Advocates, has been appointed to the Judgeship vacant by the death of Lord Mackenzie. Mr. Clark was called to the Bar in 1849; and being the nephew of the late Lord Rutherford, who was for a great many years Lord Advocate, he early attained advancement in his profession. He served as Advocate-Depute for more than the usual time before he was

fortunate enough to obtain the usual promotion; he was made Sheriff, first, of Inverness-shire, and thereafter of the counties of Haddington and Berwick; and in 1869, when one of the principal Law Offices of the Crown became vacant by the elevation of Lord Moncreiff (then Lord Advocate) to the Bench, he was appointed Solicitor-General for Scotland, which office he held until the fall of the Liberal Government in 1874. When the present Government came into office, Mr. Gordon was appointed Lord Advocate, and in accordance with an arrangement that had been come to, or had then been supposed to have been come to, in deference to the general feeling of the Scottish Bar, that the offices of Dean of Faculty and of a principal Law Officer of the Crown should not be combined, he resigned the Deanship of the Faculty of Advocates which he had held for some years. On Mr. Gordon's resignation of the Deanship, Mr. Clark was unanimously elected his successor.

Of the merits of this appointment to the vacant chair there can be only one opinion. Many persons complained, and justly complained, of the delay in filling up the vacant seat on the Bench. The auspicious choice that has been made fully atones for any sins in that respect. A lawyer of consummate attainments and of a larger experience than that possessed by any other member of the bar, a thorough man of business, a frank and courteous gentleman, Mr. Clark takes his seat on the Bench with the universal admiration and respect of the legal profession. On hearing the news of the offer and acceptance, the first feeling was a feeling of surprise, the second was a feeling of satisfaction. The appointment will add new strength to a Bench which was not wanting in that quality, and will (if this were possible) tend to increase the confidence of the public in the decisions of the Court of Session, and in the manner in which business is despatched there.

There have been many instances of advocates who, having held (as Mr. Clark has) the highest position at the Bar, have failed to carry their supremacy with them to the Bench—have indeed proved comparative failures; simply because their forensic powers were in excess of their judicial. No one dreads such a fate for the career of the new Judge. If there was any fault in his conduct as a counsel, it was that his mind was too judicial. It is, indeed, a singular circumstance, it is an inversion of fortune, that while many eminent advocates have obtained promotion to the Bench on account of their forensic powers, the new Judge obtained the highest position at the Bar by reason of his judicial powers. It is not a little remarkable that what has ruined the usefulness of many an eminent advocate when he became Judge—the excess of the forensic over the judicial power—made the fortune of the new Judge as a counsel, or at least, did not prevent his rise to the highest position at the Bar.

The new Judge is in politics a Liberal, and the present Government is Conservative. For a Conservative Government to give a place on the Bench to a political opponent is certainly a handsome act.

But it is only a return for acts of the same kind done by the other side. We are informed that a paragraph has appeared in some newspaper, the purport of which is, that dissatisfaction is felt by the Conservative party against the heads of their own party on account of the promotion of a political opponent. As the *Journal of Jurisprudence* has no politics, we cannot pretend to speak either for the Conservative party or for the Liberal party, and we have had no opportunity of consulting with Messrs. Tadpole and Taper on the subject. But we have, and cannot help having, an opportunity of knowing the sentiments on this matter of lawyers and of other people on both sides of politics, and we are certain that if any dissatisfaction is felt anywhere it is not among the members of the legal profession, or indeed by anybody else in Scotland. Those who have to take part in the administration of justice know the value of a good Judge. A Judgeship is an office of the first public importance, and it ought not to be the perquisite of a party. Politics are much, but the service of the country, admiration of intellect, and the amenities of life, are more.

*The Deanship of the Faculty of Advocates.*—This office has become vacant by the elevation to the Bench of Mr. Andrew Rutherford Clark. The office is one of usefulness, of influence, of distinction, of historic renown. The duties connected with the office make it necessary that those who have the election in their hands should be prudent in their choice. The position, that of the head of the Scottish Bar, elected by the members of the Scottish Bar, is one which is worthy of desire by the most eminent advocate, and which the youngest aspirant looks forward to in his most ambitious dreams. Naturally, therefore, there has been no little speculation, and there exists no slight anxiety as to who is to be the future Dean. Several names have been mentioned in connection with the vacancy; and there is no name that has been mentioned that is not entitled to respect. Where personal merits enter, and must enter, largely into a contest, it is a delicate and indeed an invidious task to take a part. But on the present occasion, we have this felicity, that however the election may go,—whoever may be elected to the vacant office, the new Dean will not be unworthy of his predecessors, and will give no reason for the Faculty to regret the choice they have made. Several names, we have said, have been mentioned; but practically the contest, if contest is to be, rests between two gentlemen—Mr. Patrick Fraser, the Sheriff of Renfrewshire, and Mr. Watson, the Solicitor-General. The claims of the latter gentleman are obvious—are conspicuous. Now that Mr. Clark has gone to the Bench, Mr. Watson possesses the largest practice at the Scottish Bar. In every personal respect he is worthy of the office. But there is one objection to him, and that we conceive to be an insuperable one. It is this; he holds the office of Solicitor-General. There are several objections to the conjunction of the

two important offices of a principal Law Officer of the Crown and of the Deanship of the Faculty. In the first place there are not so many distinctions at the Bar of Scotland that we can afford to bestow them all upon one person. And secondly (and this is the most important consideration), the duties of the two offices are incompatible. A Lord Advocate, and still more, a Solicitor-General, is a subordinate of the Home Office. The Dean of Faculty represents the legal profession. To impose the duties of both offices upon one man is to place him in a false position. To perform adequately the duties of the double office requires the virtue of duplicity, and his warmest admirers have never asserted that Mr. Watson possesses that qualification. From early times there has been a strong opinion—an opinion which is on record, against the conjunction of the two functions; and the circumstances of the present time, when Governments, both Whig and Tory, are inclined to transfer Scotland to London, and are bent upon being Sheriff-Substitute-wise and ironclad-foolish, give a new strength to this opinion. In 1695, we find from the minutes of the Faculty of Advocates that the Lord Advocate of the time, finding the duties of the two offices incompatible, “be ane missive direct to the Faculty, demitted his being Dean of Facultie,” and “entreated” the Faculty to accept his resignation as “the greatest favour.” But it is not necessary to potter over the history of ancient times. In 1830 Mr. Jeffrey, the then Dean of Faculty, was appointed Lord Advocate. On being made Lord Advocate he thought it right to resign the Deanship, and he addressed to each member of the Faculty the following letter:—

“Having had the honour of being appointed to the office of His Majesty’s Advocate for Scotland, I have resolved to resign my situation as Dean of the Faculty of Advocates.

“I am sure I need not say that it is with no little reluctance that I thus relinquish the most gratifying of all the distinctions to which any member of our profession can aspire. But, having long entertained and avowed a firm conviction that such a conjunction of offices is inexpedient, and likely on many occasions to be disadvantageous to the Faculty, I now feel myself called on to act on that conviction, and must not allow myself to hesitate in announcing my purpose to my brethren.

“I shall retain the office, of course, till it suits the convenience of the Faculty to appoint me a successor; or even till the annual election in January, if it should rather be their pleasure to defer the nomination till that natural termination of my functions. But when the day of election comes, I must, if in my present situation, be regarded as a disqualified person.—I have the honour to be, etc., F. JEFFREY.

“24 MORAY PLACE, 9th Dec. 1830.”

In “Jeffrey’s Life” by Cockburn, we find the following passage:—“He was of opinion that in the particular circumstances of the Scotch Bar, where there are few official honours, the situations of Dean and of Lord Advocate or Solicitor-General should not be

monopolised by one person. Acting on this principle, he resigned the Deanship."—Vol. i., p. 310.

This subject is one which Lord Cockburn seems to have had very much at heart, for in his last-published "Journals" he refers to the same subject:—

"The Dean of Faculty (Peter Robertson) having been made a Judge in consequence of Meadowbank's resignation, the Faculty of Advocates have chosen Duncan M'Neill, Solicitor-General, to be their Dean in his place—altogether wrong; because the Deanery and the office of Lord Advocate, or of Solicitor-General, should never be combined. These are the only three high honours that the Faculty has, and they ought never to be monopolised. The Dean should be as independent as he can be made; but, if the chief local organ of Government can hold the place, it will never be independent at all. It was on these principles that Jeffrey gave it up on being made Lord Advocate in 1830. No man till now has been made Dean for the first time who was also Lord Advocate since 1796. The Lord Advocate of that day (Robert Dundas) was chosen Dean, but this was by the men who dismissed Henry Erskine, and in the ferocious age that applauded that act."—*Journal of Henry Cockburn*, ii. p. 58.

It is true that in more recent times the two offices have been filled by the same person. But there was such a strong feeling excited against the conjunction of the two offices, that it was generally understood they were never to be combined again. When Mr. Moncreiff, now Lord Moncreiff, became Lord Justice-Clerk, Mr. Gordon was appointed Dean of Faculty. He was nominated by Mr. Young, then Lord Advocate. In nominating him Mr. Young remarked: "For my own part, I hold the office of Dean of Faculty in so high estimation, that I think it ought to be a 'lonely splendour,' and I almost hope that the Faculty will not again consent to its being united with any other office."

When Mr. Gordon was appointed Lord Advocate last year, he resigned the office of Dean of Faculty.

The qualifications of Mr. Fraser for the office of Dean of Faculty are many and great. He has made more important contributions to the legal literature of Scotland than any other lawyer since the time of George Joseph Bell. There are not many Scottish law books which are known all over the world; but the treatise on the "Personal and Domestic Relations" is one of them. Besides his general claims, Mr. Fraser has special claims upon the Faculty of Advocates. There is no person who has given greater attention to the business of the Faculty; nor is there any man in Scotland who has rendered more unnoticed services to the public in the way of suggesting legislation and correcting the crudeness of bills. To elect Mr. Fraser to the vacant office would do honour to the Faculty, and would confer on him the appropriate reward of a lifetime of labour.



## THE DEANSHIP.

THE Deanship is vacant, the office must be  
 Upheld by a man in the highest degree  
 Learned, and wise, and revered by his peers;  
 A heritage won by the labour of years.  
 No idle toy given to dazzle the vain,  
 No royal road onward to practice and gain;  
 But an earnest of work that is loyally done,  
 A splendid, long close to life's setting sun,—  
 His be the glory and his be the shame  
 Who grasps the high honour without the high aim!  
 The trust he receives is the Faculty's heart,  
 And hold it he must all alone and apart;  
 For much as we reverence Bar, Bench, or Queen,  
 We reverence still more our own chosen "Dean."  
 And cursed be the hand or party who dare  
 Dishonour a laurel that clings to his chair—  
 The laurels of Erskine, and Jeffrey's renown,  
 The delight of the Bar, the pride of the gown.

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 Review.

*Sketch of the Career of Duncan Forbes of Culloden, Lord President of the Court of Session, 1737-47.* By PATRICK FRASER, LL.D., Advocate. Aberdeen. 1875.

THE fashion of the day in history is to attribute everything to the circumstances, and little or nothing to the individual. If the question is of the Reformation, for instance, it is not, it seems, to Luther in Germany, nor to Knox in our country, that praise is due. They were but representative men, borne along by the tide of events, and mere mouthpieces for the spirit of their times. It is the same, according to our new school of historical criticism, with all great eras in the history of the race or of the nation. The man whose name lives as the director, or even originator, of any great change, political, social, or religious, merely said what all men thought, or did what the majority secretly desired and urged. That there is some truth in this view no one can question; the proper time must come after long and almost imperceptible preparation before the man fit for the occasion can act. But, after all, circumstances are not everything; or rather, a great personality is in itself often the indispensable and determining circumstance in human affairs. A great man is the product of his race, his nation, his times; but his peculiar powers are quite as much needed to any great event as is the state of affairs propitious for their exer-

cise. He lends to any period in which he bears sway a something which is personal to himself, and which is due to him alone. If we may not say with Carlyle that the history of a nation is simply the history of its heroes, we may well concede that the great steps in national history are often summed up and marked in the lives of great men.

Every one knows what Scotland was at the Union—a poor country, proud of its ancient independence, and distrustful of the great partner which it had found. Elements of discord there were in plenty, in the rooted jealousy of England, the lingering attachment to the Stuart cause, and in the disturbed and semi-barbarous state of the Highlands. The legislative union of the two kingdoms was at first merely a union upon paper; and for a time it was a grave possibility that England would have only another Ireland on her hands in the North. The first need of Scotland was settled government, peace, and the spread of industry, agricultural and commercial. Had ancient national hatreds been revived, had the Scotch nation as a whole been stirred in the wrong way towards the assertion of a separate existence no longer expedient, a really national revolt against the Union might easily have been the consequence; and England would then have had nothing for it but to proceed by way of arms, with all the endless heartburnings and lasting disaffection which force applied to a proud people produces. It was true patriotism after the Union to adhere firmly to the Treaty to its full extent, and to pursue a policy of peace and settled order under the reigning house. To adopt such a policy heartily and deliberately was to rise above the mere prejudices of place and tradition, and to lead the new era with a new and appropriate spirit. Such was exactly and in the main the merit of Duncan Forbes of Culloden. Born three years before the Revolution settlement of William and Mary, and dying two years after the Jacobite Rebellion of '45, his life extended over a most critical period in Scotch history. An Advocate-Depute during the first Jacobite rising in 1715, he was Lord Advocate from 1725 to 1737, and President of the Court from the latter year till his death. During all his public career he was, of all the men of his time, the man who most firmly held and practised the policy that the happiness and prosperity of Scotland lay in the direction of faithfully adhering to and carrying out the Union. Nor were his political theories the mere dry premises of a politician and a minister. It was the peculiar grace of the man that his statesmanlike views were fired and animated by as pure a patriotism as ever burned in Scottish heart. His "poor country," as he was wont to call it, was the foremost object of his thoughts; the pacification of the Highlands, and the spread of commerce and industry, were the aims he pursued with a more than personal ardour. Before the '45, he urged the policy of providing for the Highlanders, so long accustomed to an irregular military life, service in the British army.

But the Government of the day, less wise than its successors, had not his vigour and originality, and declined to avail itself of that splendid courage which has made the records of the Highland regiments famous in later British history. When his warnings were unheeded, and the Rebellion of 1745 did break out, Forbes, then President of the Court, hastened to the North, and by his personal influence did much to hinder thousands from flocking to the Stuart standard. Then, and for years before, he was practically Governor of Scotland, and he spared neither his purse nor his person in his endeavours to resist the Jacobites by force. He met with not much gratitude from the English Government; nor were even his drafts on his private fortune for the public service ever made good to him. Indeed, after the Battle of Culloden, he got into disgrace with the authorities by his honestly expressed disgust at the brutalities of Cumberland the Butcher, and his efforts to procure for the vanquished Jacobites terms short of proscription and forfeiture. His countrymen then and now have not failed to reckon this Court disfavour of his later years honourable to his memory; but the neglect of his counsels, and his distress at the severe measures which were taken against his "poor country," broke his heart. He died in 1747, under this temporary apprehension for his country's fate; while his work has lived after him in a national prosperity beyond what he could have dreamed, and in a union with England so close and cordial that the present generation cannot even imagine repeal as possible. His life is another proof that, to be a great leader of a party, a man must rise above party. Forbes was above all things a patriotic Scotchman, and it is as such that his countrymen of all parties now honour his memory.

We are not of those who think it well that Scotchmen, in being heartily British, should forget the great men who have aided to make Scotland what it is. To a patriotic endeavour now being made in Inverness in order to raise a national monument to Forbes of Culloden, the Scotch public is indebted for the resuscitation of an admirable sketch of President Forbes, from the pages of the *North British Review*. The old unwearied industry of Mr. Patrick Fraser, with his reverence for the landmarks of Scottish Jurisprudence, appears in every line, and his paper, if it were necessary, is recommended by having been originally published in the *Review* under the editorship of the late Lord Barcaple. The mention of two such names—an editor whose too short services on the Judicial Bench are remembered by every practitioner with respect and regret, and an author to whom the Law of Scotland is under no small obligations—reminds us that we have not as yet spoken of President Forbes as a lawyer. Nor, indeed, do the necessary limits of this slight notice permit our enlarging on this branch of the subject. It is not to be forgotten, however, that it was the law by which Forbes raised himself to that position of patriotic usefulness as a statesman, which his countrymen now seek to commemorate.

Public attention in Scotland has, unfortunately as many think, been engrossed by the mere ecclesiastical history of the country. Many causes for this popular current of thought will readily occur, but the result is obvious to every one, that law and lawyers have no such place here in popular thought as they have in England. An Englishman will speak of the laws of England with a respect bordering on affection, which is traditional in England, and is entwined with the great history of English freedom. A Scotchman has no such sentimental feelings for his nation's jurisprudence; and if any legal memories linger traditionally among the people, they relate to Sir George Mackenzie, the "bluidy Advocat," and the cruel laws against the Covenanters. As lawyers we are quite content that it should be so, and that we should be taken only for what we may be worth as public servants. But none the less as Scotch lawyers we must be proud to trace a true apostolic succession of great men engaged, generation after generation, in moulding our laws and legal institutions, and in rendering the College of Justice an intellectual centre for our native land. Nay, magnifying our office, we may venture to affirm that the existence of such a centre never was more important than it is at this present time, in order to prevent Scotland from sinking into utter provincialism and money-grubbing as a mere intellectual appanage of London. But leaving all controversial matter, it is satisfactory to know that Scottish lawyers had long ago, as the noble statue in the Parliament House testifies, united in recognition of President Forbes as one of their greatest names. There is the less need, therefore, for pressing his claims to remembrance in a legal Journal.

In glancing over the pages of Mr. Fraser's sketch which are appropriated to the career of Forbes as Lord Advocate, one cannot help noticing, with a sardonic smile, how history repeats itself, or rather how, in certain legal matters, history never varies. We find the same sacrifice of private interest to public and parliamentary duties, and the same difficulty of conquering the indifference of London statesmen to Scottish wants and Scottish claims, as we find in our own time. "After Forbes became Lord Advocate," says Mr. Fraser, "his attendance upon Parliament was of the most unremitting description; for in 1734, when his brother was dying, he wrote the whipper-in of Government an excuse from Edinburgh in the following terms:—

" ' You can recollect, that since first I had the honour to serve the Crown, *I never was one day absent from Parliament.* I attended the first and the last, and every intermediate day of every session, whatever calls I had from my private affairs to be here; while at the same time my friend the Solicitor-General was permitted to stay out the whole term in this place; the attendance of one of us upon the courts, in term time, being thought necessary for his Majesty's service.'—*MSS.*

"In a letter which he wrote long afterwards, when occupying the office of President of the Court of Session, he refers inci-

dentally to the difficulty he had in inducing English statesmen to attend to Scottish affairs. After informing his correspondent, Lord Mansfield, then Solicitor-General, of the Bills he had drawn up, and which the Lord-Advocate had carried with him to London, he thus proceeds :—

“ ‘ Now, Dear Sir, what brings you this trouble is an apprehension that my Lord Advocate may stand in need of assistance to rouse the attention of the men of business, who take the lead in Parliament, to what may concern this remote country, unless the evil to be obviated is very mischievous to, and sensibly felt in England. What degree of acquaintance or familiarity my Lord Advocate stands in with the leaders of Parliament, I cannot tell ; but as I, who in my day had the good fortune to stand pretty well with our Government, found it extremely difficult to bring them with any degree of attention or concern to think of Scotch matters, I greatly doubt he may find it at least as much so, at a season when their thoughts are employed in subjects rather more interesting ; and therefore my earnest request to you is, that you will undertake the management of it, in full conviction that the fate of Scotland, at least for this generation, depends on it.’—*MSS.*”

“ The Lord-Advocate appears to have been overawed by the great men of the South ; and Forbes, whose disposition was as unbending as iron when there was anything at stake affecting his country’s interests, immediately denounced this complying disposition, on the ground that ‘ nothing can be more dangerous to this country than that turn in a man of your Lordship’s character and abilities, when the laws and constitution of it are in question.’—*MSS.*”

Of the eminent services of Forbes to law, and still more to right and justice, in Scotland, in his capacity of President of the Court of Session, Mr. Fraser thus writes :—

“ The Court of Session, at the beginning and near the end of the last century, was one of the most inefficient in existence. Fifteen Judges sat at once upon the Bench ; and of course the necessary consequence of such a crowd was a continual bickering among themselves, and the use of epithets towards each other, which supplied in vigour what they wanted in courtesy and decorum. Their number freed them from responsibility ; and their votes were given as much from caprice, or friendship, or enmity to party or counsel, as from any regard to law or justice. No reports have survived, except on the faint breath of tradition, of the stormy scenes that sometimes disgraced the Court ; but enough remains to tell us that the Bench, when Forbes took the chair, was in its lowest state, and that before he left it he brought it to a condition that it has perhaps never equalled since. Mr. Burton has forcibly shown this, by calling attention to the fact that it was while Forbes was President that the greater number of those ‘ leading cases,’ preserved by Kilkerran, which have guided our subsequent jurisprudence, were pronounced. Let a decision be cited from that era, and it is beyond attack. A more remarkable

proof of the talents of Forbes as a lawyer could not be advanced. While much before him, and much that followed, in the decisions of our Courts, has fallen before the learning and investigation of later times, the decisions of his time have stood unassailable. The change was perceptibly felt even in his own day, since Hardwicke even is found writing him thus:—‘I conceive great pleasure in the different degree of weight and credit with which your decisions come before the House, from what they did a few years ago, an alteration which I presaged would happen, and do most sincerely congratulate your Lordship on the event.’—*MSS.*

“To effect all this he had much to contend with in the obstinacy of his colleagues. But his firm spirit, his established fame, his great talents, and the general superiority of the man, silenced opposition, and ultimately procured, if not sympathy, at least acquiescence. He could not prevent their voting according to their interests or their passions, but he was there to administer a rebuke, which he was not the man to omit, if it served his purpose. He got rules of Court passed for the expediting business, and carried them into effect with a pertinacity that no *vis inertiae* of his colleagues could resist. Three years after his advancement to the Bench, he could make the boast to Lord Hardwicke, that, at the expense of ‘several hundred hours’ extra labour, no cause ripe for judgment remained undetermined, a circumstance which has not happened in any man’s memory, and of which the mob are very fond.’ Like Lord Kenyon, too, he was ever a friend to the poor suitor, if he saw him oppressed. Nay, he was at his old practices, in getting up subscriptions among the Judges themselves, for the relief of the unhappy, in the consideration of whose fortunes Judges have so much to do. His compassion was always of this description,—‘I pity him five shillings; how much do you?’ His contemporary biographer, describing him as a Judge, says, that ‘he was so mild and affable in discourse that none could resist his persuasion; he encouraged the Lords to do justice, and if he observed any bias in them, proceeding from the face of a great man, he would say, By God’s grace I shall give my thoughts sincerely, and your Lordships will judge in this matter as you will be answerable to God. When he spoke there was a profound silence,—the lawyers and Lords put themselves in a listening posture.’—A profound silence in the old Court of Session!”

We have only to add by way of caution that the certainly forcible passage describing the condition of the Court of Session, and stating that Forbes “brought it to a condition that it has perhaps never equalled since,” was published some time ago, and particularly before the year of grace 1868; and that if the just and gentle spirit of President Forbes first raised the Court of his day above mere personal and local prejudices, his successors in our time have risen above the more modern vices of mere technicality and routine. A Scotchman has written for England the Lives of the Chancellors, will no one supply for his own country the Lives of the Presidents?

R. V. C.

## The Scottish Law Magazine and Sheriff Court Reporter.

### SHERIFF COURT OF ABERDEENSHIRE.

Sheriff COMRIE THOMSON.

ELRICK v. NOBLE.—13th October 1875.

*Law Agents' Hypothec—Compromise of Suit—Right of agent to sist himself as a party to suit to obtain decree of expenses.*—The case was at the instance of Alexander Elrick, labourer or fisherman, Castle Lane, Fraserburgh, against John Noble "Little," fisherman, Broadsea, for recovery of £17, 18s. 9d. of wages. A defence was stated, and the record closed, after which the defender's agent lodged a minute in process, stating that the defr. had paid, and the pursuer had received £17, 12s. 8d. in full of the claim sued for, on condition that the action was withdrawn, and that the pursuer should pay his own costs; and produced the pursuer's receipt to that effect. The pursuer's agent then enrolled the case to have himself sisted as a party to the case in order to obtain decree of expenses, and Sheriff Thomson has now pronounced the following interlocutor :—

"Aberdeen, 13th October 1875.—Having resumed consideration of the cause, and considered the motion made by the agent of the pursuer on his own behalf, that he should be allowed to sist himself as a party, in order to obtain decree for expenses—Refuses the said motion : And decerns,

"JOHN COMRIE THOMSON.

"*Note.*—This is an action for wages at the instance of one fisherman against another. A defence was stated to the effect (1) that the pursuer left the defr.'s service before he was entitled to do so; and (2) that the rate charged was excessive. Upon this defence the parties joined issue, and a proof was allowed. Before it was led, however, the parties settled the dispute in the country without the intervention of their agents, or, at least, without the knowledge of the pursuer's agent in Aberdeen. The receipt granted by the pursuer to the defr., which contains the terms of the settlement, runs thus :—'Received from (defr.) the sum of £17, 12s. 8d., being in full of my claim against him as his hired fisherman for season 1875—202½ crans being the quantity caught—and the action raised at my instance against said (defr.) is hereby withdrawn, and I am to pay all expenses to my agent.' The case is thus at an end, and it is useless to contend that the parties were not entitled to compromise and settle their dispute without the knowledge and concurrence of the pursuer's agent. The pursuer is master of his own cause, entitled to deal with it as he chooses, to drop the claim, to diminish the amount, and, in fact, to do what he thinks fit with it.

"But there is a well-known doctrine of law which, in certain circumstances not altogether dissimilar to those presented here, would be held to apply. The agent for the pursuer maintains that in this case effect should be given to it in his favour. Among the means known to the law by which law agents are enabled to recover their professional debts is one of the nature of hypothec, or preference on the costs to be recovered from an adverse party in a suit. This is a different right from the lien which agents have on papers placed in their custody, but it is one with which all practising lawyers are familiar in more forms than one. Thus, the agent for a litigant to whom costs are found due is entitled to have the decree for expenses issued in his own name; and, again, there cannot be pleaded as a set-off to that decree a debt due by a client to the unsuccessful party. A still stronger application of the rule has been sanctioned in several well-known cases, where, although decree for expenses has not been taken in the agent's name, he will be entitled to insist upon being satisfied for his costs out of the sum decerned for before payment can be made by the adverse party to his client.

"But it seems to me that to give effect to the agent's contention here would

be to extend his right of hypothec beyond what is warranted by the authorities on the subject. There are three elements wanting here, one or other of which seems to be essential to entitle the agent to prevail. (1.) There has been no decree pronounced in the cause giving expenses against the defender. (2.) There has been no judgment on the merits of the case, the effect of which would probably be to carry expenses. And (3.) It is not alleged that the parties compromised the case conclusively for the purpose of disappointing the agent's claim for expenses.

"With reference to the last desideratum, it may be said that the agent has had no opportunity, except that afforded him of an oral statement at the bar, of setting forth the circumstances in which the settlement was made. But from that statement, I understand that he founded solely upon the terms of the receipt, and many reasons of expediency may be supposed to have led to the settlement, besides a conviction on the part of the defender that he could not ultimately gain the cause. The authorities on the subject are reviewed in *Hamilton v. Hay* (29th Nov. 1854, 17 D., 107). J. C. T."

*Act.—N. Clyne.—Alt.—W. Moir.*

## SHERIFF COURT OF ELGINSHIRE.

Sheriff D. MACLEOD SMITH.

COOPER v. SPENCE.—22nd Sept. 1875.

*Fishing for Finnock.*—The respondent was charged under the Summary Procedure Act with fishing for finnock in the river Spey at Garmouth, in contravention of the Acts 9 Geo. IV. c. 39 (1828), and 7 & 8 Vict. c. 95 (1844), and was concluded against for the penalties imposed by these Acts. The river Spey at Garmouth was assumed to be a public river—see *Journal of Jurisprudence*, vol. xiii. p. 224. The other points appear from the opinion of the Sheriff in disposing of the case.

The Sheriff said "the charge in this case is that the respondent, Mr. Spence, on the occasion mentioned in the petition, caught a fish which is alleged by the prosecutor to be prohibited by the Act of Parliament on which the complaint is founded. As to the evidence of taking the fish upon that occasion, or which is the same thing, of trying to take fish of the kind upon that occasion, I cannot have any doubt, as Mr. Spence was seen in the act of fishing. The two watches came up and asked what he had got, and he told them he had got a finnock. They saw it with him, and the rod, and line, and hook, and he continued fishing after they left him. Therefore the act of fishing as set forth in the complaint was undoubtedly committed. The only question is, What are the legal consequences of that Act? These consequences depend upon whether or not the kind of fish which is the subject of the prosecution falls under the prohibition of the Act of Parliament or not. According to the ancient and common law of Scotland, the rights of the grantees of salmon fishings did not extend beyond the kind of fish commonly and familiarly known to every person by the name of salmon, properly so called. No doubt the grantees of salmon fishings were in the practice of also taking and marketing sea-trout, and other fish of that description, because they had superior means and opportunities of taking them. But the right to take sea-trout, and all fish other than salmon properly so called, in public waters, seems to have belonged, as a public right, to the general community. The Act of Parliament passed in 1844, and the previous Act of 1828, under both of which the present complaint is laid, appear to me to have totally changed the complexion of the matter. It is unnecessary to quote the terms of the Act of 1828, because they are repeated and extended in the Act of 1844. That Act—the Act of 1844—provides, 'That, if any person, not having legal permission from the proprietor of the salmon fishery, shall wilfully take, fish for, or attempt to take, in or from any river, stream, lake, water, creek, bay, or shore of the sea, &c., any salmon, grilse, sea-



trout, whiting, or other fish of the salmon kind,' such persons shall be liable for the penalties now sued for. These terms are most comprehensive. If the classification of naturalists is to be taken, which includes all these fish as part of the genus *Salmo*, the terms of the Act quoted appear to transfer almost every fish in all these waters from the general public to the owners of salmon fishings. Even common river-trout are classified by naturalists as belonging to the genus *Salmo*. As to whether or not the words of the Act include the finnock as a fish of the salmon kind, I have not the least doubt. All the witnesses for the prosecution, of whom there were five respectable and competent persons, gave their opinions as the result of their experience and observation that the finnock is the young of the sea-trout. One of them said the finnock had the same relation to the sea-trout of the Spey that the whiting had to the sea-trout of the Tweed, of which it is the young. The witnesses for the defence, including several gentlemen of experience and observation, said, on the other hand, that the finnock is not identical with the sea-trout. Some of them mentioned some marks of distinction, such as that the sea-trout is thicker in proportion to its length, and the spots larger. Others of them said that they had not seen sea-trout at that stage of their growth. Some of them said that the finnock was a hybrid fish, others that it was a distinct species, and that roe was found in some of them. But, even looking at those differences, if there are such, they amount to very little, and if we look to the substantial qualities of the fish, I must hold that in everything that goes to establish substantial resemblance, such as the general shape, the brightness and colour of the skin, and the quality and appearance of the flesh, whether they are actually sea-trout or not, they are substantially identical with the fish which are mentioned and comprehended in the Act under the description of fish of the salmon kind. I have carefully and anxiously read over the Act, but I see no possible escape from holding that it has been contravened."

Mr. Forsyth—"I must say, with due deference to your Lordship, that I do not think a single scientific witness has ever said that the finnock is the young of the salmon-trout."

Sheriff Smith—"I do not go upon that. The whole substantial qualities are the same or similar to those of the sea-trout, and the words of the Act are so strong that I do not see how it is possible to hold that any fish so substantially resembling the whiting or salmon-trout are not of the salmon kind. As the question is a new one, and as I understand that the case is for the purpose of testing a point of law, I will only impose a fine of 10s., and I think the expenses should be modified to 20s."

*Act.—Cooper & Wink.—Alt.—Forsyth & Stewart.*

## SHERIFF COURT OF LANARKSHIRE, GLASGOW.

Sheriff GUTHRIE.

INSPECTOR OF GOVAN COMBINATION PAROCHIAL BOARD v. JOHN MULVEY.  
—Oct. 18, 1875.

*Poor—Removal—Lunatic—Able-bodied Man—Husband and Wife.*—This was an application made by the Inspector of the Govan Combination Parochial Board to have John Mulvey and his family removed from their poorhouse to Ireland, they being in receipt of parochial relief. The Sheriff-Substitute has refused the prayer of the petition, adding a note, which explains the circumstances of the case.

"This is one of a class of cases which are of great importance, because they involve an interference with personal liberty, but which, I fear, from the character and circumstances of the parties, do not always receive the attention they deserve, and in which moreover there is reason to believe that some variety of practice in various respects prevails even within this Sheriff Court.

"In the present instance an application is presented by the Inspector of Poor of Govan for the removal to Ireland of John Mulvey, his wife, and three young

children. Mulvey is an able-bodied man who has been hitherto supporting his wife and children ; but, unhappily, his wife having become insane has been confined in the Govan Parochial Asylum since 20th July last, at the expense of the parish.

"The Poor Law Act of 1845 and the Amending Acts require the Sheriff on the application of the Inspector of Poor, and subject to certain conditions, to grant warrant for the removal to England, Ireland, or the Isle of Man, of any poor person born in one of these countries and not having acquired a settlement in Scotland, and who is 'in the course of receiving parochial relief in any parish or combination in Scotland.' The Sheriff must be satisfied, *inter alia*, that the poor person 'was born either in England, Ireland, or the Isle of Man, and has not gained any settlement in Scotland, and has actually become chargeable to the complaining parish or combination by himself or his family.

"It is now an established point in the Poor Law that the confinement of the wife or child of an able-bodied man as a pauper lunatic under the provisions of the Lunacy Acts does not pauperize him. (*Palmer v. Russell*, Dec. 1, 1871, 10 Macph. 185). He continues capable of acquiring or of losing a settlement: he must still support his children, and may be punished for deserting or neglecting to maintain them. The only effect of his wife's mental affliction, in the case of a labouring man, is that the law takes her from his family and sends her to be maintained in a lunatic asylum at an expense far greater than he can bear. She becomes a pauper in her own right—a condition which has been long recognised in the law of Scotland as possible even for those who have not a settlement in their own right. (See *McCrorie v. Cowan*, March 7, 1862, 24 D., 723 ; *Beattie v. Adamson*, Nov. 23, 1866, 5 Macph. 47 ; *Palmer v. Russell*, cit.) The question, therefore, is whether the terms of the statute as to the removal of paupers to England and Ireland require this able-bodied man and his children to be removed from this country, where he is earning his livelihood, because his wife has become chargeable as a pauper lunatic. I can find in these statutes no terms which authorise or require the removal of an able-bodied man who is not himself a pauper. Such an enactment as this—giving an exceptional power of interfering with personal liberty—must be construed strictly, and I cannot find any justification either in the words or spirit of the Acts for reading the words as extending to the case where the father himself is not a pauper. It may be said that he is literally 'chargeable' to the complainer's parish 'by his family,' because his wife has become a pauper lunatic in the parish. But that is not in my opinion the meaning of the Legislature in this section of the Act of 1845. The word chargeable is not used in any non-natural sense, but in its simple and usual meaning, in which that implies that the person of whom it is used is a pauper, whether he stands in need of parochial aid from utter inability to support himself, or from inability to work so as to earn enough for a family, or from the fact that his wife or children, being deserted or separated from him, have received relief as paupers, because the law has made an exceptional provision for those who are in the condition of his wife, has withdrawn her from his immediate care, and made her chargeable to the poor rates.

"After the clear and emphatic decision that one in the position of Mulvey is not a pauper, I think it would need much clearer language than any which is to be found in the statutes as to the removal of paupers to justify the issuing of the warrant now asked against him and his children. It was admitted by the complainer that Mulvey and his children might return to Scotland at once without incurring the penalties imposed by the Acts. If this be so, it shows very clearly the impropriety and incompetency of a compulsory removal so ineffectual.

"The question remains, Whether it is competent to remove the lunatic wife alone to Ireland, the place of her birth, or rather of her husband's birth and settlement? Although it appears to be undesirable, on grounds of humanity (for which, however, there seems to be no room in questions of this kind), to remove this woman from the vicinity of her husband and children, I was at first disposed to think that as she is a pauper in her own right—as she is

'chargeable by herself' to the complainer's parish—she falls within the letter of the Act; and that a warrant must be granted for her removal. I have come to think, however, on further consideration, that it is not intended by the Acts as to the removal of paupers that one member of a family should in any case be removed to Ireland or England without the others. The whole tenor of the Acts leads to the opposite result, and indeed the Act 25 and 26 Vict., c. 113, expressly declares that the warrant to be granted shall order the removal of the 'poor person with his family, if any.' The family in this case is not strictly that of the pauper, whom mental disease has placed in the anomalous position of being a pauper in her own right, while her husband, whose status is that of the children also, remains self-supporting. The husband and family cannot, as I have said, be removed to Ireland, and as the Acts obviously do not intend that members of the same family should not be separated by the power of removal which they give, except where the children may have gained a settlement in Scotland, I am of opinion that to remove the wife alone is also unauthorised. It is true that she is already separated from her husband and family, being confined in a lunatic ward; but that is done under the provisions of the Lunacy Acts, it is a removal only to the asylum of the district in which she and they were residing, and there is nothing to require or justify the distance between the husband and wife to be increased by her removal to Ireland.

"I have been referred to an opinion by the Lord Advocate and Solicitor-General of Scotland, given in October 1871, to the effect that in such a case as this the whole family may be removed. That opinion, which is given with hesitation, rests on the ground that the husband is pauperised by his wife being treated as a pauper lunatic, a view which was negatived very soon after by the opinions of the Court in the case of *Palmer v. Russell* already referred to. While therefore the highest respect is due to the opinion as counsel of Lord Young and the present Dean of Faculty, it is clear that its reasoning must be disregarded, when the principle on which it depends is negatived by a subsequent judgment of the Supreme Court.

"The result of my judgment is that there can be no removal of paupers in such a case as this. If the same view should be generally adopted in Sheriff Courts, the result may be of considerable importance to some parishes. But this ought not to be regretted, if it shall have any effect in leading to a reform of the law of settlement and relief of the poor, with which the law of removal is closely connected. There is no reason to believe that the law of removal is carried into execution with any undue harshness by parochial officers; but experience shows that in some cases it is necessarily attended with great hardship."

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THE

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ENGLISH AND FOREIGN JURISTS AND INTERNATIONAL  
JURISPRUDENCE.

PROFESSOR LORIMER'S INTRODUCTORY LECTURE, SESSION 1875-6.

CONSIDERING how well, and with how much reason, our fellow-countrymen on the other side of the Tweed are satisfied with themselves, it is not surprising that they should have difficulty in understanding why foreigners do not always share their sentiments; nay, why they occasionally indicate a preference even for so obscure and benighted a race as ourselves. Now, without travelling beyond the field in which we are called to labour, or citing authorities that are strange to English ears, I think I can furnish one explanation of this bewildering phenomenon.

Mr. Gladstone, it appears, recently addressed a letter to a Professor in the University of Macerata, in which he stated to him the grounds on which he believed it would be impossible to induce either the English public or the University of Oxford to take part in raising an international monument to Alberigo Gentili. Several of the reasons which he gives are not discreditable to his countrymen; and, for my own part, I entirely sympathize with the "repugnance in the present day in England to commemorate by means of monuments persons who lived so far back." If the works of such persons have preserved their memories so long, it is not unnaturally thought that they will preserve them still, to the extent to which they still continue to be worth preserving; and notwithstanding the interesting biographical study of Alberigo Gentili, which we owe to my friend Mr. Holland, the Professor of International Law at Oxford, his name certainly is not a name to conjure with, where those of Shakespeare and John Knox have failed. Compared not only with many who followed him, but with many who preceded him, he was a small and commonplace man; and, viewing them simply as jurists, I would ten times rather subscribe for monuments to Dominic Soto or Francisco Suarez, of whom the latter was only three years older than Gentili; or, going back to a former time, and a greater than any of them—to Thomas Aquinas.

But Mr. Gladstone's candour compelled him to add two other reasons of a less satisfactory kind. He told his Italian correspondent that the English universities, in place of being institutions for the advancement of science, and as such in a condition to join hands with learned bodies in other countries, "are regarded by the public simply as large schools for the use of students of a certain age;" and, in proof of the fact that, in so regarding them, the public do them no injustice, he added with reference to the science in which Alberigo was distinguished: "Besides, the scientific study of law is at present almost at an end amongst us, although it is seriously intended to seek some means of reviving it."

No copy of this letter, so far as I know, appeared in any English newspaper. But it was published in Italy, and the Italian version of it, given in the *Diritto*, has now been translated, and appears in the October number of the *Herald of Peace*. It is a letter which very few Englishmen would have written, and perhaps Mr. Gladstone's Scotch blood may have had some share in inspiring it. Nor will many Englishmen read it, now that it has been written, or trouble themselves much about it if they do. If it excites any remark in England at all, it will probably take the form of a few well-worn jokes about the Peace Party and Mr. Richard, a little chaff about Professors, and perhaps a little insolence, to Mr. Gladstone. But, accustomed as we all are to freedom of speech, that will break no bones; and when some additional ignorance as to the meaning attached by Continental jurists to "natural law" has been exhibited, the usual platitudes about utilitarianism have been repeated, and the mummy—if such it deserves to be called—of old Jeremy Bentham has been fumigated with the accustomed rites, the complacency of our countrymen will be restored, and the affair will be forgotten.

Forgotten in England;—but what of Italy? Italy is the land to which, since Germany went on the "war-path," the mantle of scientific jurisprudence seems to have fallen. In no country in Europe is the relation between theory and practice at this moment more intimate,<sup>1</sup> the character of jurisprudence as a branch of the science of nature better understood, or the haphazard, "leap-in-the-dark" legislation in which we pride ourselves more at a discount, than in Italy. What, then, must Italy think of a nation of which one of its greatest, if not its very greatest intellectual magnate says, and says without the possibility of contradiction, that the scientific study of law is "almost at an end," if indeed it ever began, in it? Nor, though for the present Italy, after her long intellectual holiday, exhibits an unusual activity in the cultivation of scientific jurisprudence, both in the abstract

<sup>1</sup> See, for example, Articles 6-12 of the new Code Civil of Italy (1865), with reference to private international law, translated and commented on by M. Mancini, in his admirable Report to the Institute of International Law at its recent meeting at the Hague (1875).

and the concrete, is she exceptional either in the pursuit of it, or in the method which she employs. With the solitary exception of England, there is not a civilized country in the world which does not consciously strive to place its jurisprudence on a scientific basis, to bring its positive enactments into harmony with the natural laws of the relations which they seek to determine. They may succeed in this, or they may fail in it, but they all attempt it; and when an Englishman tells a foreign jurist that he does not attempt it at all, that he does not even understand what it means, that so far as he can see human relations are governed by no natural laws, and that positive laws are entirely arbitrary, the foreigner holds up his hands in astonishment, or shrugs his shoulders in contempt. When after this the Englishman talks about "principles," as he probably does in the next sentence, the foreigner in his turn is bewildered, shakes his head, and mutters something about the "Chinese."

So long as such discussions are confined to municipal law, no great harm comes of them. Foreigners admit that Englishmen rub along pretty fairly at home, though they cannot tell how; and even when they hear that, after having declared law and equity to depend on different principles, and administered them in different courts for ages, Englishmen, without the slightest attempt at scientific reconciliation, have thrown them into "hotchpot," and stirred them together by means of an Act of Parliament, they simply laugh. Should Englishmen after this continue to maunder about the distinction between perfect and imperfect obligations, *jus strictum* and *jus voluntarium*, *comitas gentium*, and the like, it will only add to the fun. But when an Englishman and a foreigner meet on the common ground of international law, the affair is more serious. So long as the Englishman accepts the results at which the foreigner has arrived, the foreigner asks no questions as to the means by which so happy a consummation was brought about. But suppose they differ; the foreigner not unnaturally is desirous of some little explanation of the "firm basis of principle" on which the Englishman tells him he relies. "Basis," cries the Englishman, "the basis of utility, to be sure!" But "whose utility?" asks the foreigner—"yours or mine?" "Neither yours nor mine," shouts the Englishman, triumphantly, changing his ground, "both yours and mine, everybody's, 'the greatest happiness of the greatest number!'" "Good," replies the foreigner; "we are out of utilitarianism and into eudemonism. I am with you there. But how are we to agree as to what happiness means? Of your happiness I might perhaps permit you to judge, though even that is a grave question; but I should certainly like some other measure of mine, and of other people's than your opinion. Have you no means of appealing from Philip drunk to Philip sober, no test by which happiness may be tested?" The Englishman replies that "utility" is the test; the foreigner looks at the other foreigners, and the *séance* is concluded.

It is a merciful provision that, after such triumphs as these, the conversations at which Englishmen assist at table-d'hôtes and in cafés are but partially intelligible to them, and that their social qualities atone for their scientific shortcomings, and gain for them a consideration as individuals which is very far from being extended to them as representatives of science, or defenders of the policy of their country. But though it is well that our countrymen should be respected, as our countrywomen are admired, for qualities which, if we must choose between the two, we ourselves should prefer to the best scientific training, it is very undesirable and surely very needless that those of us who labour under no peculiar congenital defects, when we come before the world as diplomatists and jurists, should expose ourselves to being treated as if we scarcely deserved to be ranked amongst "vertebrate animals."

I rejoice to hear that it is seriously intended to seek some means of reviving the scientific study of law in England, and when I read such addresses as that which Sir Edward Creasy lately delivered to the Social Science Association, I begin to hope that the efforts of such men as Lord Selborne, and my friend Mr. Westlake, are at last to be rewarded with success.<sup>1</sup> But if Englishmen really wish to become acquainted with scientific jurisprudence, they must make up their minds to purchase the acquisition at the price that others pay for it. If they covet the superstructure, they must be contented to lay the foundation. The revival must embrace the study of ethics and mental philosophy, which, for the present, too, is "almost at an end amongst us." The enterprise ought not to be hopeless in a land which produced the Cambridge Platonists of the seventeenth century, and in the present day can boast of Platonists like Jowett, and Aristotelians like our own learned and genial Principal. English jurists do excellent historical work, as witness Sir Travers Twiss's edition of the *Black-Book of the Admiralty*. Why should they seem as if they had holes in their bellows the moment they attempt to breathe the more rarified atmosphere of scientific jurisprudence?

Nor is it in order to restore the intellectual prestige of our country alone that we urge this revival. Never were the commonest material interests of a country more dependent on the labours of scientific jurists than those of this country at the present time. There is scarcely any direction in which the position of England, when seen from a cosmopolitan point of view, is not exceptional. Her insular situation: her limited area: the prodigious extent of her Colonial empire: her hitherto unbroken social organization, and consequent success in combining liberty with order: her vast trade: more than all, perhaps, the supremacy of her mari-

<sup>1</sup> Very characteristically the *Times*, in its report of Sir Edward's address, omitted the whole of the first portion of it, in which he dealt with scientific jurisprudence; and the *Saturday Review* had its little stereotyped sneer at the "alphabet of international law," which it is unwilling to learn.

time, and the relative insignificance of her territorial resources as a fighting power—these, and many other circumstances which will occur to you, isolate her, to the extent of rendering her policy partially unintelligible, and, I fear I must add, marking her out as an object of jealousy to other nations. That her interests—her immediate interests as a separate nation—differ, and must continue to differ, from those of every other nation, is indisputable; and that interests which differ will often seem to superficial observers to conflict, is inevitable. For us to argue, then, that a particular line of policy is “useful,” is just the very last proceeding by which we are likely to commend it to foreigners. Opposing their interests to ours, as they necessarily do so long as they look at them from the one side or the other, they believe that what is useful to us must be hurtful to them. Nor do we gain their confidence, or even their goodwill, by abandoning, or professing to abandon, our interests for theirs. The case is not one for generosity and self-denial, and there is no hope of persuading foreigners to credit us with such amiable weaknesses. The notion of our abandoning a traditional policy on the ground that foreigners “dislike it,”<sup>1</sup> or adopting one because they like it, is a notion which we must dismiss from our minds from motives of the most obvious policy and common sense. By adhering to claims which we defend on no higher grounds than self-interest, we excite the hatred of foreigners; by abandoning claims which we conceive them to assert on the like grounds we excite their contempt. In order to obtain, or even to merit, their friendship, or failing their friendship their respect, we must give absolute reasons for the policy which we adopt,—we must show that, in the circumstances in which we and they are called upon to act, that policy is the concrete realization of the abstract or natural law which governs the relation actually subsisting between us. With our own countrymen it unfortunately happens that the only line of argument which is effectual with foreigners would be of no avail. To offer to an English opponent to defend an existing positive law, or to challenge him to defend one which he proposed to substitute for it, by showing that it is in accordance with an absolute law by which you assume the relation to be governed, would seem to him, I am well aware, an act of gratuitous pedantry. And at the stage which his studies had reached it probably would be so. If a schoolboy tells me honestly that he does not know the multiplication table, I may be entitled to whip him for not having learned it, but I have no right to expect him to do the rule of three. If an English jurist tells me that he does not know what is meant by natural law, or absolute law, or necessary law, or ideal law, or anything of the kind, and that his only conception of positive law is that of “law as it is,” I know that his scientific pistol has no lead in it, and I am not entitled to fire at him with ball, though I may be quite justified in punishing him otherwise if he persists in blazing powder in my face. But the same defence will not avail.<sup>a</sup>

<sup>1</sup> *Contemporary Review*, Oct. 1875, p. 742.



Continental jurist. He knows perfectly well that, be the circumstances what they may, the existence of an ideal concrete law is just as inevitable as the existence of an ideal straight line between two points; and that, unless his concrete law conforms to it, there is another and a better concrete law, in virtue of which, if I can find it, or approach nearer to it than he has done, I am entitled to call upon him to abandon that which he seeks to maintain. The relation, with its opposing factors—belligerent and belligerent, belligerent and neutral, neutral and neutral, state and state, state and citizen—be they what they may, the two points being there, I can insist that he shall stretch his ideal line between them, and determine the concrete rights and duties which it marks off on the one side and on the other. So long as I adhere to a relative standard, a standard that is resolvable into his opinion or mine, he responds to me by declamation, and the prolonged and melodious notes of my eloquent friend Professor Pierantoni of Naples—"like linked sweetness long drawn out"—will be found sufficient to silence the *Βρεκεκεκέξ κοὰξ κοὰξ* of a whole chorus of utilitarian *Βατραχοί*, even when re-echoed by London penny-a-liners. But when an absolute standard is insisted on, and the banner of science is raised, men of the class of Mancini, and Rolin Jaquemyns, and Neumann, can no longer decline to come to the front. Even brave old Bluntschli will not scorn to take sword in hand, and look out for something better in the shape of *rüstung* than the *ipse dixit* of a non-maritime power, or a resolution of the Bremen Chamber of Commerce in 1859.<sup>1</sup>

I am keenly alive to the danger of encountering such antagonists; but believing, as I do, in the instincts which have guided the traditional policy of my country, feeble as I acknowledge her scientific light to have been, I shall venture to run a tilt with them on ground, for my acquaintance with which, such as it is, I humbly acknowledge myself to be their debtor, on behalf of the belligerent right of capture at sea, and of the neutral right of freedom of trade. Be the issue what it may, I trust my foreign colleagues will acknowledge that I have striven to do by them as they would have done by each other had they chanced to differ, and if I fail to convince them, there is at any rate a chance of their convincing me.

I. As regards the right of capturing private property at sea, then, what I assert is, that, not as a means of defence only, but as a *moyen de guerre*—as a means of bringing a legitimate war to a successful issue—it falls fairly within the principles of civilized warfare, as these principles are understood by Continental jurists.

And here I put aside at the outset, as belonging to municipal law, two questions which have often been, and indeed are usually, treated as international.

(a) Whether the State is entitled, without security or compensation, to expose the property of a portion of its population to the exceptional risk of loss which this rule involves. This, which I

<sup>1</sup> *Moderne Völkerrecht*, p. 373.

call the "Chambers of Commerce" question, those who have read some letters which I recently addressed to the *Times* will know that I answer in the negative. The moment that a ship is captured, I regard it as public property; and I conceive that the State to which the owner belongs is bound to make the loss its own, taking the chance of indemnifying itself by the results of the war. In this respect the position of a ship at sea differs in no respect from that of a box of cigars in a tobacconist's shop. If its seizure be legitimate at all, all that international law has to do with the matter is to furnish the private owner with the means of proving the extent of his loss.

(b) Whether or not it be in the power, or for the interest, of the particular state to avail itself of this weapon, supposing it legitimate.

The bows and arrows of our ancestors are not forbidden by the principles of modern warfare, and if any modern potentate chooses to use them, international law has no right to interfere. King Kofi did so, without reproach, on a recent occasion.

But just as little can the law of nations interfere with the opposite belligerent, and compel him to reciprocate. An appeal to it with this object by poor Kofi would have been everywhere regarded as a joke; and yet our good neighbours the Germans regarded it as no joke at all, but on the contrary were extremely angry with us, when we laughed at them in England for the offer which they made to France, at the beginning of the late war, to renounce the right of capture of private property at sea, and still more at the lofty and injured air which they assumed when France declined to reciprocate.

That there are powers, real or apparent, which in this inexplicable world do not generate rights, is but too true; and if the power of maritime capture can be shown to fall under this category its exercise may be forbidden, and ought to be forbidden even by those who have no power to prevent it. But till this can be shown, for the non-maritime powers to come to the maritime powers and offer to surrender this right *mutually*, and then haughtily to "resume it" when the offer is declined, is just about as reasonable as if I were to go to Cardinal Manning, and propose to him that he and I should enter into a similar transaction with reference to the next election to the Papacy. If it would be a relief to my conscience to renounce my right to become a candidate, Cardinal Manning would probably have no objection; and if I chose to resume my right he would be equally well pleased; but he could scarcely be blamed though he declined to entertain my proposal of reciprocity. Nay, as matters actually stand between England and the other powers, the case is scarcely met even by this illustration. It is rather as if I were to go to the Pope himself, and propose to his Holiness that he should resign, on condition of my promising to renounce my claim to be his successor.

These municipal considerations, then, being laid aside, the question

of the right to capture private property at sea, in its international aspect, limits itself to this:—Assuming a state to have the power of seizing the property of private belligerent citizens at sea, does the right to exercise this power, to the extent to which the state may conceive it to be for its advantage, adhere to the power; or is it cut off from it by the limits which international law, as the interpreter and guardian of humanity, has imposed on the exercise of belligerent power? Opponents of the class with whom I desire to deal will not revert to the doctrine of the “balance of power,” and allege that this power, being peculiar to a single state, or possessed by a single state in greater measure than by other states, is itself condemnatory of its use; for on that ground the state in question would be entitled to object to the use of any weapon of territorial warfare which other states possessed in larger measure, or could wield with greater effect than itself. Nor will they attempt to ascribe an international character to the Chamber of Commerce argument on the ground that, till dealt with generally, it might act unequally in different states. If England should guarantee her shipowners from exceptional risks, as I hope she will, and other states should fail to follow her example, that plainly is their affair. The question, as I have said, is a municipal one, with which each state is entitled to deal as it thinks fit. Lastly, they will admit that the argument that the policy is a suicidal one for England, from the amount of private shipping which she would expose to risk, is wholly irrelevant from an international point of view. If Englishmen are deceived in thinking that by means of convoys, guaranteed routes, and otherwise, they can protect their shipping and preserve their carrying trade; if they are wrong in believing, as most of them I fancy do, that no “Alabama” could ever have got more than three miles from the neutral port in which she was built if the English navy had been on the watch for her,—as the American navy ought to have been, and would have been, had there either been no Foreign Enlistment Act, or had America had to deal with a less wealthy customer—then that is England’s affair. Should we ever stand to a neutral power in the position in which the United States stood to us on that memorable occasion, I think I can predict that, in place of wrangling over the clauses of an unintelligible Foreign Enlistment Act, and looking forward to filling the pockets of his countrymen, and paying the expenses of the war by means of damages, direct and consequential, as the American Ambassador in London did, our Ambassador would simply telegraph for a ship of war; and I for my part should look forward to her proceedings with a very different measure of confidence from that which I should repose in the “Three Rules,” even as amended by the Institute of International Law. But this is an “aside” to my countrymen, and wholly by the way. My foreign colleagues know very well that, whilst the legitimacy of war is recognized, a warlike weapon cannot be

taken out of the hand of an independent state, internationally, merely for its own protection, as a knife would be taken out of the hand of a child. Recognition implies majority, the recognized state is *sui juris*, and can be disarmed, internationally, only on the ground that the weapon which it wields, or the use which it makes of it, is exceptionally inhuman. It is on this narrow ground that I challenge my learned opponents to meet me, and to object to the seizure of private property at sea.

1st, then,—Is it more destructive to life and limb than any other form of warfare? I call for statistics!

2nd. Is it more injurious to morality than the march of a hostile army, the billeting of its soldiers, and the levying of contributions, in a hostile country? I challenge them to prove it!

3rd. Is it less possible for the state to guarantee the citizen against exceptional loss in the case of property seized at sea than on land? Let them explain the difference!

4th. Is the English navy a less disciplined force, the honour of its officers or the honesty of its men less reliable, than in the case of any land force in the world? I beg them to make the most searching scrutiny into the facts.

In insisting that the decision of the general question, whether or not England be entitled to retain, and exercise if she chooses, the right of capturing private property at sea, shall be perilled on their answers to the purely international questions I have here enumerated, I think my foreign colleagues will admit that I am not dealing with them unfairly, or departing from the rules of the game, as we mutually understand them. That no answers to these questions are embraced in any of the many attacks that have been made on what is still acknowledged to be the rule of the law of nations, with which I can be expected to be acquainted, is an assertion which I make with little hesitation, and for making which, if it can be disproved, I shall eat "humble pie."

II. As regards the capture of private property at sea, I have said that "law as it is," the existing and recognized law of nations, if there be such a thing, is on our side. My Continental colleagues desire to alter it; and I argue for its retention, on the ground that it is in accordance with "law as it ought to be." Every separate entity is entitled to vindicate its rights by the use of the means at its disposal, unless those means can be shown to be illegitimate: England is such a separate entity, and the means in question cannot be shown to be illegitimate: England then is entitled to their use, if she thinks proper to use them. Such is the syllogism which, in behalf of my country, I venture to nail on the gates of the Institute of International Law.

In the second of the two burning questions of the day we stand in a different and less fortunate position. As regards the question of the responsibility of the neutral state, in its corporate capacity, for the conduct of its citizens, in their private capacity,

we have conceded the principle, we have submitted in our Foreign Enlistment Acts, and still further and more definitely in the Three Rules of Washington, to its concrete realization in a number of points which for the time being seemed to us to be for our advantage; and now that Continental nations, believing the principle to be for their advantage to a still greater extent, are disposed to impose it on us as a general rule of the law of nations, we begin to see that it involves the prohibition of neutral trade in articles in which we are accustomed to deal, and we kick up our heels against it. We are here the assailants of "law as it is," or at all events as we have attempted to make it, in virtue of what we have come somewhat too late to perceive is "law as it ought to be."

Now here, even more than in the former case, it is our interest to lay hold on the horns of the altar of science; for it is in a recurrence to, and a revision of principle alone, that our safety consists. Little accustomed as we are to connect practice with principle, it will not be contended even by us, that we can go on with the principle, the consequences of which we accept when they suit ourselves, and reject when they suit our neighbours. Logic, whether we like it or not, is a cosmopolitan weapon, which we cannot refuse to handle, and if we consent to handle it in this instance, I believe our neighbours will very soon show us by means of it, that the principle we have unwarily accepted goes the length of the total abandonment of trade between neutrals and belligerents. To what extent it may be pushed in practice will then be a question not for us but for them. That they mean to push it to the extent of prohibiting trade in munitions of war, is a fact of which they already make no secret; and he who trusts to definitions of munitions of war for protection from its further inroads on neutral trade is surely trusting to very slippery ground. If we admit the principle, whether we seek to evade its application by definition, or by simply stopping short at the point which suits us, we shall be hopelessly outvoted, as we were in the question of maritime capture at the Hague, the other day.

But the revision of a principle—still more, as I fear is necessary in this case, the reversal of a principle, which we ourselves have accepted, nay, of which up to the unfortunate *περιπέτεια* which befel us at Geneva, we had made ourselves a sort of apostles to the Gentiles—means, not learning alone, but learning in its most odious and irksome form, that namely of unlearning. Still it is to this distasteful process that, as the condition *sine qua non* of progress, one half at least of the intellectual activity of every generation of mankind must be devoted. One half at least of what we call truth is error; and that half must always be unlearned before the other half can be profitably applied. And we ourselves have unlearned a great deal in our day. We have unlearned protection. All men were protectionists down nearly to the end of last century, and it was very hard for them to be told by a theorising old Pro-

fessor of Moral Philosophy in Glasgow that protection was a mistake. But they were told it, and it was explained to them, and gradually they came to see it, and even to admit it. The growth of the science of political economy, and the prodigious development of trade, on the new basis which was thus furnished to them, are probably the most remarkable examples, the one in theory, the other in practice, of the effects of the triumph of knowledge over ignorance, of reason over prejudice, *by means of the study of natural law*. In politics proper we are far from having yet reached this point. Men have not yet devoted themselves with any consistency of effort to the study of the laws which govern the relations of the state to the citizen, or the citizen to the state, and there is consequently no science of politics in the sense in which there is a science of economics. But here too we have made some progress. We have forgotten some error, if we have not learned much truth. In 1832 we forgot Toryism. In 1867 we forgot Whiggery. Since then we have been engaged in forgetting Radicalism; and when it is forgotten, the process of learning may possibly begin. Even on the Continent, where men cannot forget as it were from the outside, as we do, and have a troublesome fancy for going at once to the root of the matter, the central error of the French Revolution—that of absolute equality with its fatal corollary of universal and equal suffrage—is *sub judice*, and the best minds in France already reject it. A distinguished French statesman and Academician, M. de Parieu, came up to me the other day and shook me warmly by the hand. "I know you are an advocate for proportional representation," he said. "Hold to that; you are right (*Tenez à cela, vous avez raison*). We cannot realise it in France at present, but it is the only means by which liberty can be prevented from degenerating into anarchy." In principle I do believe we were thoroughly in the right, and I have never seen anything like an honest attempt to meet what I and others said on that subject, on the ground of principle. In the practical suggestions with which we accompanied our argument, in my own case more for purposes of illustration than for any other reason, we too may have had much to unlearn. I do think we were somewhat "doctrinaire;" and it has since occurred to me, that we should have been more in accordance with our social traditions had we urged the giving of plural votes, not directly to each individual in proportion to the grounds of political consideration which he might possess, but indirectly, by giving votes to bodies to which persons of intelligence and respectability belong—to clergymen, lawyers, physicians, bankers, members of a Chamber of Commerce, and the like, as they are given to graduates in our universities. This I think was Earl Grey's plan; and I believe it is in this form rather than in that which I myself proposed, that, to a certain extent, our common object may yet be attained. In advocating the enfranchisement of

important bodies of the community, we should have the benefit of their support against the dead weight of Radical opposition, and Whig and Conservative timidity; and something of the sort ought certainly to be attempted when the question is again awakened up by a County Franchise Bill. In this country, moreover, I begin to be hopeful that, even without the political safeguard of a graduated suffrage, we may escape anarchy by means of our social organization, which has happily remained undisturbed by revolution, and by which our feeble and anomalous political constitution is propped up. So long as political leadership is conceded to intelligence and culture, the result is the same, whatever may be the character of the electoral body. But we have been sailing as yet in the calm of unwonted prosperity, and our anxieties can scarcely be removed, till we have seen the results of a general election under the influences of dear food and low wages. "Cassandra's" warnings may be more prophetic than we venture to hope.

But, though we may trust to it overmuch, it is the ethical not the intellectual element in English character to which England is indebted for her exceptional wellbeing as a state. Reverence for God, and where reverence is due, for man,—a characteristic so deplorably wanting in France,—is intuitive in England. For the gifted, the aged, the long-descended, there is an instinctive tendency to make place; the effort is not to rival but to imitate our betters; and society, from the very bottom, thus takes an upward direction. When foreigners come to understand us better than they do, they will see that it is in this, and not in the theoretical balance of our "marvellous constitution," which they have examined so anxiously and imitated so vainly, that they must seek for the explanation of our political stability and progress. Paradoxical as it may seem, I do not hesitate to assert, that as regards not only the guidance of conduct, but the formation of opinion, there is a certain advantage in the preponderance of the moral over the intellectual element in the character of Englishmen. Not only is the love of truth stronger as compared with the love of victory, but the process of unlearning is less hard to a people whose opinions continue to a great extent to rest upon feeling, than to a people who have reasoned them out, and are satisfied that they are the logical results of assumptions which may possibly be false, and at all events are not likely to be entirely true. If the principle requires revision, you get at it more readily where no process of reasoning, in itself probably irrefragable, stands between it and the conclusion on which action depends. Of the facility with which we get rid of principles which we never reasoned out very logically into their consequences, the distinction between law and equity, which I have already mentioned, and the doctrine of the *comitas gentium* as the basis of private international law, our deliver-

ance from which in England we owe to Mr. Westlake, might serve as examples.

I have been led to this reflection by a difference which seemed to me to exist between the position of my foreign colleagues at the Hague, and that commonly occupied by publicists in this country, with reference to the Neutrality Laws. Though, in their present form, these laws are the work of Englishmen and Americans—who are only Englishmen once removed—I believe that foreigners, having learned them, will have greater difficulty in unlearning them than either Englishmen or Americans. The accuracy of the logical process by which foreigners are in the habit of deducing them from the principle of the responsibility of the state in its public for the citizen in his private capacity, on which we stumbled by accident, and which from a feeling of our wider acquaintance with maritime affairs more especially they accepted at our hands, will shelter them from their scrutiny as it will not shelter them from ours. On the other hand, in dealing with foreigners there is this advantage, that with them it is possible to disprove an erroneous principle by bringing it to an absolute test, a mode of proceeding which it would be vain to adopt with Englishmen or Americans. They never deny the authority of Nature, or decline an appeal to her.

Conscious of these counterbalancing advantages and disadvantages in the one direction and in the other, it is not without much hesitation that I venture to submit the following brief attempt at a re-examination of the principle of neutrality, on which the question of the responsibility or non-responsibility of the state in its corporate capacity for the conduct of its citizens in their private capacity depends, to the tribunals of English and Continental criticism.

*General principle of neutrality.*—The natural, and, as such, the ideal conception of the relation between states at war, and friendly states which desire to remain at peace with them, is IMPARTIALITY.

As their mutual friend, the neutral state must, if possible, act as the friend of both. It is this conception, and not that of INDIFFERENCE, which the positive law of nations must seek to realise; and I neither share nor envy the opinion of those who, whilst proclaiming neutrality to be a friendly relation, declare it to consist in standing contentedly aside and seeing two friends tear each other to pieces. The attitude of indifference between human entities, whether individual or corporate, bound together as they are, by the links of mutual rights and mutual duties, I regard as one which nothing short of necessity can justify. It was as identified not with "*peace*," but with *indifference*, that I applied to neutrality the epithet of an abnormal relation, an epithet which, as used by me in this connection, my distinguished colleague Professor Bluntschli has misunderstood.<sup>1</sup>

Now it is in the presence or the absence of this necessity that the distinction consists, as I believe, between the relation of the

<sup>1</sup> "Communications relatives à l'Institut de Droit International" (1874), pp. 278-9.



neutral state to belligerents in its corporate capacity, and when viewed as an aggregate of free men.

(A.) The state in its corporate capacity is bound, if possible, to assume the attitude of a mediator, peaceful if may be, warlike if need be, and for the assumption of this attitude the state ought not rashly to disqualify itself by a proclamation of neutrality. But mediation is intervention, a relation which excludes, and is excluded by, the conception of neutrality. Unlike neutrality, it involves a decision of the question at issue, and means of carrying that decision into effect, neither of which may be within the reach of the state.

Should intervention be rendered impossible by want of power, or want of knowledge of the situation, I believe that there are scarcely any conceivable circumstances in which the state, in its corporate capacity, can be impartial, otherwise than by abstaining absolutely from all interference. In this case the identification of impartiality with indifference is inevitable, and neutrality implies absolute non-interference.

I arrive at this conclusion mainly on the following grounds. (a) The state, in its corporate capacity, is a physical unity, and cannot act in two opposite directions at the same time. It must be wholly with one belligerent, or the other. (b) Even if such action were physically possible, it would neutralize itself and leave the belligerents where they were. But all neutralization of force is forbidden by the natural law of economy. God and nature are ideal economists, and to neutralize force is to sin against absolute law. (c) The state in its corporate capacity has its forces within its control. It can consequently save force by abstaining from action. It can be impartial by being indifferent, and only by being indifferent. Indifference, meaning thereby an entire suspension of the ordinary arrangements of peaceful intercourse, is thus forced upon it, and justified by its necessity.

(B.) The neutral state, viewed as an aggregate of private citizens, on the other hand, can in no circumstances control its forces entirely; and its power of doing so becomes less and less as liberty advances. The extent to which this is the case in free countries is scarcely conceivable to those who live under despotic governments. The attitude of indifference is in this case excluded by the same necessity which warranted it in the other; and the central conception of impartiality can be realized only by leaving the natural laws of intercourse to operate freely. By attempting artificially to arrest them,—to tie the hands of its citizens, and lock them up within its borders—the neutral state deceives both itself and the belligerents. The attempt is one in which it never has succeeded, and never will succeed. Nor ought it to succeed; for its success would be gained at the expense of a violation of private by public order, and a consequent invasion of individual freedom. I entirely subscribe to what M. Mancini has said on this subject, in another connection: "*Les droits d'ordre privé appartiennent aux hommes*

comme hommes, et non pas comme membres d'une société politique" (Rapport à l'Institut de droit Intl., Session 1875, p. 22). Provided the legitimacy of war in general, and of the war in question in particular, be recognized, fighting on either side is not a crime, *eo ipso*, with which municipal law can deal. The state has no more right to constrain the citizen, *in his private capacity*, to be neutral, than the citizen has a right to constrain the state, *in its public capacity*, to be belligerent. When he has paid his taxes to the neutral state of which he is a member, his obligations as a neutral citizen are discharged. He has conformed to the policy of the state in the only capacity in which the state is known to him. Again, the state knows him only as a citizen, and its responsibility has reference to him only in that capacity, unless he be identified with it, and his individuality sunk in it, by holding its commission. It is only by adhering rigorously to this distinction that any limits can be set to the responsibility of the neutral state. The moment it is departed from, and that actions which do not violate private order are forbidden on public grounds, freedom of speech is endangered as well as freedom of trade, we may be forced into Ultramontanism or democracy, as the Vatican or the Revolution gains the ascendancy, and it is at the option of belligerents to hold neutral states responsible for their platform orators and newspaper editors, just as much as for their ambassadors and secretaries of legation.

The rule here then must be, to leave both belligerents to regulate their relations with the citizens of the neutral state by the ordinary motives of sympathy and self-interest; or, within the region of trade, by the laws of supply and demand. By throwing its markets, like its press, absolutely open, or rather leaving them so, the neutral state acts to the belligerents with the same impartiality as if it absolutely closed them; and whilst the former proceeding certainly is easy, the experience of every war has proved the latter to be impossible.

Assuming the distinction here indicated to be valid, let us try to work it out into concrete rules of action.

1st. *Obligations of the neutral state in its corporate capacity.*

a. The neutral state in its corporate capacity shall not fight on the side of either belligerent, either on land or at sea.

b. It shall not permit the belligerents to fight, to arm or to drill troops, or to man or equip ships of war, or for war, within its jurisdiction.

c. It shall not permit any person in its service at the commencement of the war, or who shall subsequently enter it, whether military or civil, to fight, to enlist in the ranks, or to aid either belligerent, diplomatically or otherwise, even after he has quitted its service.

d. It shall not give, lend, or sell an object which may aid either belligerent in the prosecution of the war; and as every object which the belligerent desires must, more or less, possess this quality:

e. It shall not trade with either belligerent even in articles which do not possess the character of munitions of war, or give or lend him such articles.

f. It shall not increase or diminish its import or export duties to either belligerent during the war, even with a view to its own profit.

g. It shall not lend money, whether gratuitously or for interest, either directly through its officers or indirectly through private persons.

h. Fugitives from either belligerent shall be permitted to enter its territory and to quit it at will; but such arms or other munitions of war, including money, as they bring along with them shall be given up to the enemy.

2nd. *Limitations to the responsibility of the neutral state when viewed as an aggregate of private citizens.*

a. Trade, in every species of commodity, between neutral and belligerent citizens in their private capacity, shall be absolutely free, without distinction between such commodities as may or may not possess the character of munitions of war.

b. Neutral citizens in their private capacity may trade with belligerent states in their corporate capacity, whether directly through their public officers or indirectly through private agents.

c. Neutral citizens may give or lend money or any other commodities, whether possessing the character of munitions of war or not, to belligerent citizens, or to belligerent states.

d. The neutral state shall not be bound to inquire into the motives which may lead to transactions between its citizens in their private capacity, and belligerent citizens or states; and it shall be no breach of neutrality though these transactions should not be entered into for purposes of gain.

e. The neutral flag shall cover both neutral and belligerent property, without distinction between what may or may not possess the character of munitions of war.

f. The Right of Search shall be limited to the ascertainment of the nationality of the vessel, and the fact that the cargo is the property of private persons.

g. The registration of the vessel in the neutral country in the name of a neutral citizen in his private capacity, shall be guaranteed by the neutral state; and if any question as to its genuineness shall arise, such question shall be decided by arbitration.

h. In so far as its genuine character is not disputed, such registration shall be accepted as conclusive of all questions as to its real ownership. The onus of proving that the cargo, or any portion of it, belongs to a neutral government, and that it is destined for a belligerent port, shall rest with the belligerent who makes the allegation, and the question shall be decided by arbitration.

i. Belligerent ships shall be entitled to enter the ports of neutral

states and to trade with neutral citizens in their private capacity, in commodities of every kind, without reference to their object, or to whether or not they be given for value received.

*j.* Neutral citizens in their private capacity shall be entitled to convey commodities, including arms and munitions of war, to belligerent citizens or belligerent states, whether by land or by sea.

*k.* Neutral citizens in their private capacity shall be entitled to construct ships of war, to prepare them for the reception of their equipment, and to sell, lend, or give them to belligerent citizens or belligerent states, whether within the neutral territory or elsewhere.

*l.* The neutral flag shall cover ships constructed for warlike purposes, so long as they are neither armed nor equipped, and continue to be registered as the property of neutral citizens.

*m.* The neutral flag shall cover all commodities, munitions of war included, on board of such ships so long as they are stowed as ordinary merchandise, and the crew are unarmed.

*n.* The responsibility of the neutral state for the conduct of the crews of such ships shall cease when they quit neutral waters.

*o.* The neutral registration shall cease to guarantee the property of a ship which equips herself, or procures an equipment, after she has quitted neutral waters; and she shall be liable to be seized under the neutral flag, her whole cargo confiscated, and her crew detained as prisoners of war.

### 3rd. *Enlistment.*

*a.* Neutral citizens, not in the service of the neutral state at the commencement of the war or afterwards, shall be entitled to enlist in the service of either belligerent, either within the neutral state or elsewhere; but their neutral citizenship shall cease from the moment that the fact of such enlistment is proved to the satisfaction of the neutral state.

*b.* Neutral citizens so enlisting shall be regarded from the moment of enlistment as citizens of the belligerent state whose service they have joined. They shall not be liable to seizure in a private vessel carrying the neutral flag and possessing a neutral registration, so long as they commit no act of hostility; but their conveyance by a public ship, or any ship belonging to the neutral state beyond neutral waters, shall be regarded as a breach of neutrality.

*c.* Where an Extradition Treaty subsists between the neutral state and a belligerent, other than the belligerent into whose service a private citizen has entered, such citizen, whilst he continues within the jurisdiction of the neutral state, shall be liable to be surrendered under such treaty; but it shall be regarded as a breach of neutrality on the part of the belligerent to whom he is surrendered if the citizen so given up be treated with greater severity than an ordinary prisoner of war.

*d.* A belligerent formerly a citizen of a neutral state shall be en-

titled to no protection from his own state, either diplomatically or otherwise, so long as he holds the commission of a belligerent; but on renouncing such commission, whether at the termination of the war or previously, it shall not be regarded as a breach of neutrality though his former citizenship should be restored to him.

I submit these rules to the consideration of international jurists, chiefly for the purpose of illustrating the distinction for which I contend between the position of the neutral state in its corporate capacity, and when viewed as an aggregate of private persons. I am far from imagining that, even when adjusted to existing circumstances by persons possessing greater practical knowledge than I at all pretend to, they would ever entirely satisfy any two belligerents at the same time. That, I fear, is what no neutral laws can hope to accomplish. But over our existing neutral laws they would have, I think, these two great advantages;—they would admit of being really observed by neutral powers; and, when so observed, they would, without interfering with the private rights of private neutral citizens, be impartial in reality, whether they were felt by belligerents to be so or not. It is on this latter ground mainly that I urge their claim to scientific recognition by the Institute, and that I hope they may, in principle at all events, commend themselves to peace-loving powers.

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### SEA-TROUT, BULL-TROUT, AND WHITLING.

THESE are fish which have not been expressly treated of by any of our institutional writers, and have not been the subject of any express question or decision in our Supreme Courts. In consequence, however, of their being specifically mentioned in some recent Acts of Parliament, it is interesting to inquire on what legal footing they previously stood.

In the ancient feudal law of Scotland, certain rights in regard to fish and fishing were held to be among the exclusive privileges of the Sovereign. He had the exclusive right to sturgeons and dolphins, and to whales and other large fish above a certain size. Such fish were called royal fish. Wherever they were caught on the coasts of the Kingdom, or whoever might catch them, they were liable to be claimed on behalf of the Sovereign. He had the exclusive right, by himself and his grantees, or others authorized by him or them, to fish for salmon, wherever he might choose to do so, or wherever he might authorize them to do so. This privilege was on a different footing from that of his right to what were known as royal fish. It included, of course, the right to the salmon when caught, but it did not extend to salmon caught by third parties, in violation or disregard of the royal privileges. These, when taken, belonged to the captors as their own property, subject to such redress as might be afforded by the civil law, if it were

found necessary to call for its protection, which it might not probably be, unless the aggression was of a large or important nature. In point of fact, except in the larger rivers, the privileges of the Sovereign and his grantees, in regard to salmon, were not carried to an extreme or very exclusive extent. Very little attention was given to the smaller streams, and the sea coasts were not thought of, as it is only since the middle of the last century that any remunerative mode of salmon-fishing in regard to them has been known or practised.

Leaving whales and sturgeons out of view, it may be said that the right of fishing for salmon is the only exclusive right of the kind which has been recognized by the ancient law of Scotland as falling within the proper privileges of the Sovereign. Before the Union, it appears to have been occasionally assumed by the officers of the Crown, acting in Scotland, either of their own accord, from ideas of prerogative that are now obsolete, or from motives that cannot now be ascertained, that the rights of the Crown extended to other fishings, such as white fishings in the sea and the like, and grants have been made in name of the Crown of such fishings, but they have received no attention, and it has never been attempted to maintain or enforce them.

The legal right of salmon-fishing could not be acquired or held by a subject, as a permanent and patrimonial right, except by formal written grant from the Crown. Such grants were usually given along with feudal grants of land, by a clause *cum salmonibus piscationibus*, but a grant of the right of salmon-fishing might be given separately, without any accompanying grant of land. The right to salmon-fishing is also held to be acquired by any person holding a grant of land from the Crown, with a clause *cum piscationibus*, followed by exclusive possession of the salmon-fishings for the prescriptive period of forty years.

The question then arises, whether or not the word salmon, as used by our institutional writers, and as used in these grants, included anything more than the species of fish familiarly known by that name, and its young, and whether, in particular, it includes, or does not include, any of the species of fish known as sea-trout, bull-trout, whitling, or the like. The word salmon, as so used, is not expressly defined or explained. But it does not seem to require explanation. It is obviously used and applied to the fish familiarly known as salmon, in a manner which can only mean and include that fish, and no other. There is no indication, in any way, that the word was to be extended beyond the species so named, and according to the legal principles of interpretation all grants of monopolies, and other grants, fall to be strictly construed. The word salmon, *per se*, as used in reference to the rights of the Crown, and in grants from the Crown, can no more mean or include trout, than the word trout, *per se*, can mean or include salmon.

The right to take salmon, in one sense, may be said to include

the right of trout-fishing, because the owner of the salmon-fishing has always more opportunity of catching trout, especially large ones, than any other person. He has always the same right as other members of the public to take them, and to keep them when he gets them. But this is different from his having any exclusive right to fish for them.

Salmon, from their value and from the peculiarities of their habits, seem to have long formed a subject of legislative attention and care, more especially as regards their protection during the breeding season. The period during which they were supposed to be breeding was defined by law, and they were not allowed to be captured during the period so defined.

The earliest statute on the subject which has come down to us is one of James I. This statute (1424, c. 25) is in the following terms, viz.:—"Quha sa ever be convict of slaughter of salmonde in time forbidden be the law, he sall pay fourtie shillings for the unlaw, and at the third time, gif he be convict of sic trespassse, he sall tyne his life, or then bye it." The terms of this statute referring to "the time forbidden be the law" show that there must have been previous legislation, which is now no longer extant. Under such an Act as this, it would have been a very serious question indeed whether the word "salmonde" included anything else than the fish so known. It would scarcely have satisfied the logic, even of these rude times, to have put a man to death for killing a sea-trout, or any other trout, under an Act of Parliament directed against the killing of salmon.

This Act of James I. is followed by a whole series of Acts of the same nature directed against the killing of salmon in forbidden time. Some of these Acts mention salmon, kipper, black fish, and red fish in forbidden time, and the smolts and fry of salmon, but in not one of them is there any mention of trout or other fish as being withdrawn from the operation of the common law. The terms kipper, black fish, and red fish, are well known terms applicable to salmon at different states of their physical condition.

There is another series of Acts of Parliament against the erection of cruives, yairs, and other fixed engines, on the ground that they are destructive to salmon, and to the fry of salmon, and all other fishes, but these are Acts passed as matter of public policy for the general protection of fish from destruction by what were thought to be improper methods, and do not apply to the present question.

There is nothing to be found in any work on the Law of Scotland previous to the year 1828 as to sea-trout or bull-trout, as distinguished from other trout, neither, in any of the multifarious litigations which have taken place in Scotland in regard to salmon-fishing, does any claim appear to have been made at any time by the grantees of these fishings to any kind of trout in public waters, as falling within their exclusive rights.

Except a few general remarks, there is not much to be found in

those works as to any kind of local fishing except salmon-fishing. Lord Stair, in his *Institutes*, 2, 3, § 69, says that "there are common freedoms of every nation to fish in the sea, or in brooks or rivers, for common fishes, without any special concession from the king or other superior." He does not specify what he means by common fishes, but from the manner in which the passage occurs, he probably means all fish other than salmon and their young. Professor Bell, in his *Principles of the Law of Scotland*, § 747, says, with regard to fishing for trout, which presumably includes sea-trout, that "in a public river access to the banks, or to the water by a boat, gives to any one a right to fish." And the late Lord President Colonsay, in the case of *Somerville v. Smith* (22d Dec. 1859, 22 D. p. 279), said that he "knew of no law to restrain a person from fishing for trout wherever he might find them," provided, of course, that he had legal access to the place.

The Orkney and Shetland Islands afford a remarkable practical illustration to the same effect. In these islands there are no salmon, because there are no rivers, but the bays and small streams abound with sea-trout. It has never been maintained, or even suggested, that the right of fishing for these trout is the exclusive property of the Crown and its grantees.

It is remarkable that, previous to the year 1828, except as regards close time or forbidden time, there was no law or statute in Scotland, making the taking of salmon by unauthorised persons a criminal offence. The old Highland saying, that "it was no crime to take a fish from a river," seems to have been literally true. But in that year, the Act 9 Geo. IV. c. 39, known as Mr. Home Drummond's Act, was passed, under which such taking of salmon was made penal. This Act is to the effect that, "if any person shall trespass on any ground, or in or upon any river, stream, water-course, or estuary, with intent to kill salmon, grilse, sea-trout, or other fish of the salmon kind, such person shall forfeit and pay not less than 10s., and not exceeding £5."

It will be observed that the phrase, "other fish of the salmon kind" is used in this Act. This is a new phrase, then introduced for the first time into our legislation. It does not occur in any of the ancient Acts, or in any of the previous legal discussions or litigations in regard to salmon. It belongs to the modern science of natural history, and describes a classification which includes not only salmon, but all other fish which, according to certain fundamental parts and features belonging to them in common, may be held by naturalists to belong to the *genus* of which the salmon is taken as the type. The legal effect of the phrase will better be discussed in connection with the Act of 1844, to be afterwards referred to.

The Act of 1828, as to fish other than salmon in public waters, was found to be defective, as regards what may be supposed to have been the objects of its promoters. Notwithstanding the scope



of the phrase "other fish of the salmon kind," fish in public waters, other than salmon properly so called and their young, were not the property of any person, and the Act of 1828 did not make them so. The word trespass, as regards such other fish was not applicable, and they therefore remained very much on the same footing as before.

But in 1844 the Act 7 & 8 Vict. c. 95 was passed, in supplement of the Act of 1828. It enacts, "that if any person, not having a legal right or permission from the proprietor of the salmon-fishing, shall wilfully take, fish for, or attempt to take in or from any river, stream, lake, water, estuary, firth, sea-loch, creek, bay, or shore of the sea in Scotland, any salmon, grilse, sea-trout, whitling, or other fish of the salmon kind, such person shall forfeit and pay a sum not less than ten shillings and not exceeding five pounds," etc.

The effect of this last Act is practically to take from the general public, and to make over to the owners of the salmon-fishings, in addition to the salmon, every other species and variety of fish that fall to be comprehended under the phrase, "other fish of the salmon kind," in so far as in public waters. The Act does not do this in direct or open terms, but by preventing all other persons from taking these fish without the leave of the salmon owners, it virtually does the same thing. The terms in which this has been done at the same time illustrate the historic view which has now been taken. The Act does not say that the proprietors of the salmon-fishings are also proprietors of the other fish. On the contrary, it uses language which, by its own contra-distinction, shows that it does not hold them to be so, although in effect it gives them all the rights and privileges of being so.

The following extract, from Mr. Charles Stewart's recent work on "Rights of Fishing," is in accordance with the views which have just been expressed, viz.:—"The Crown holds the right of fishing salmon, but it may be questioned whether that right extends to all fish of the salmon kind. Sea-trout and bull-trout are perhaps 'fish of the salmon kind,' and the Salmon Acts expressly declare them to be included in their operation, but in a question of title, can the right to fish for them be held to be *inter regalia*?"

In regard to what are public rivers, possibly all rivers about or exceeding the size of the Water of Leith at Edinburgh may be held to be so. See the case of *Downie v. The Earl of Moray*, 12th Nov. 1825, 4 S. p. 167.

The question remains as to whether or not the common river-trout which are classified by naturalists as the *salmo fario* are comprehended within the words "or other fish of the salmon kind." We reserve that point from the present article, which is merely intended as a partial sketch of a somewhat obscure but not unimportant section of our law.

## BAIL.

THE recent decision of the Court of Justiciary in the case of Wilson (Oct. 20, 1875, 13 *Scottish Law Reporter*, 4), may have given not a little surprise to some students of legal reports. That a man who was charged with an act of theft, even although it was an aggravated act, should be denied the privilege of bail, upon the ground that he stood charged with a capital crime, may seem strange to those who always associate capital offences with capital punishments. For in these days even a conviction of murder is so seldom followed by an execution, that we are apt to think that capital crimes have disappeared altogether. We cannot bring ourselves to imagine that a pickpocket who relieves a man of his watch at a railway station is even theoretically in danger of the gallows. But in strict law it would appear such a man, if convicted, must be hanged, and is only saved by the clemency of that all powerful being, the public prosecutor.

This subject of bail does not throw a very favourable light upon our ancient criminal law. Where wise laws are enforced with a strong hand, we should naturally expect to find discretion exercised in the granting of such a privilege as bail. The exercise of this discretion in modern times is indeed well illustrated by this very case of Wilson. But in the administration of our criminal law in early ages, we find the distinction between bailable and non-bailable offences by no means regularly observed. The statute law, indeed, countenanced such a distinction, but the practice does not seem to have been in accordance with the law, nor is it difficult to see why this should have been so. In days when our Judges were corrupt, our exchequer in need of funds, and our prisons insecure, an offer of bail was very likely to meet with acceptance, and the nature of the offence charged was apt to be overlooked. Bail in short would, in many cases, just be the ransom paid by a powerful man who had got himself into trouble, and took this convenient way of escaping more serious consequences.

The fourth book of the *Regiam Majestatem*, which treats "of cavsses criminall," directs that "the defender quha is accused sall be attached te saif and sure pledges, and gif he has not pledges he sall be imprisoned." In other "pleyes (the writer has been dealing with the crime of treason) of felonie and crimes he quha is accused uses to be lettin frie, he find and sufficient pledges for him; except it be in the mute of manslauchter, in the whilk it is otherwayes statute and ordained, to the feare and terrour of all others."

We thus find that by our most ancient law a distinction was made between murder and other crimes. The law was rendered more strict by the Act of Robert III. c. 14, which prohibited bail from being taken in the case of certain other offences—as treason, coining, aggravated theft. But in the opinion of more than one

eminent legal writer, the practice, in spite of such a statute, was very lax. Burnet, after mentioning the Act of Robert as a remedy for the former law, says—"But such continued to be the situation of this country and the insufficiency of its police, that long after the above period 'caution to underlie law' was received in almost every case, treason alone excepted, sometimes without even an attempt to arrest the person in the first instance, and at other times as a ground for discharging him after arrest." The later statutes seem to have countenanced such a practice. Thus the Act of 1487, c. 100, which deals with men-slayers, directs that they are to be charged to appear within six days, and failing their doing so, and *finding security*, are to be put to the horn. The Act of 1540, c. 118, which is "anent burning of cornes, raising of fire, and ravishing of women," makes similar directions with regard to procedure in the case of parties charged with these offences. From certain entries in the Books of Adjournal, mentioned by Hume, it would appear that, in the seventeenth century, persons charged with housebreaking, rape, and even murder, were released on finding bail. The opinion of Hume, however, is that the statutes last referred to did not confer upon the prisoner a right to demand bail (as at present in the case of minor offences), but just gave to the magistrate a discretion to allow or refuse it as he thought fit in the whole circumstances of the case. For "it is difficult," he says, "to believe that any police could ever be maintained under a system which uniformly allowed so great a latitude of dismissing the highest and most notorious offenders on so insecure a footing." It is to be feared indeed that this discretion was often, as Burnet suggests, made use of for the oppression of the individual.

After the Revolution attention was early directed to the abuses which had arisen in the administration of the criminal law in Scotland. In the Declaration of the Estates of the Kingdom, in 1689, one of the evil deeds charged against James VII. is "exacting extravagant bale." The Act of 1701, c. 6, was accordingly passed with the view of removing abuses which had gained strength during the arbitrary rule of the last of the Stuarts. Burnet justly remarks that the people of Scotland must view this statute "as one of the greatest benefits conferred upon them by the Revolution, whether it be held as a law declaratory only of their former rights, or as introducing provisions in favour of the subject which had not previously been either so well defined or observed in practice." Its chief object is the protection of accused persons. This object it secures in various ways by preventing hasty apprehensions and undue delay in the course of the trial, as well as by defining the law of bail, and fixing the maximum amount to be paid as bail by different classes of the community. It statutes and ordains "that all crimes not inferring capital punishment shall be bailable." The Judge to whom an application for bail is made is first to determine, whether the crime charged is bailable or not, and

secondly, to modify the sum for which the bail is to be found. A question which is at once raised by the expression just quoted above is, What is the precise meaning of a "crime inferring capital punishment?" We all know that, in a former age, crimes in themselves insignificant were from motives of policy rendered capital by statute. Thus, when Popery was greatly dreaded, it was a capital offence to say mass or (when planting had to be encouraged) to pull up a young tree; again, a number of crimes have it appears been punished at common law with death at one time or another.

Is a Judge entitled to refuse bail in the case of all these crimes? If so, the prisoner's case is a hard one. On the other hand, it would be clearly inexpedient to limit the refusal of bail to the case of a charge of murder—now the only crime actually punished with death—or to such crimes as by existing statute are declared to be non-bailable. In Wilson's case the Court went upon the ground stated by Hume in his remarks upon this subject. He says, "If the crime is clearly capital, and may be prosecuted to that extent, it is no conclusive argument for admitting to bail that the rigour of the law has not lately or ordinarily been applied to such offences; nor can the prisoner insist with the prosecutor to declare or take his resolution whether he will or will not insist for the full pains of law." Now the question is in Wilson's case, just as was the offence with which he was charged, *clearly* capital. That offence was the theft of a gold watch, aggravated by previous conviction. No crime has met with a greater variety of punishments than theft, because it is a crime the seriousness of which depends upon a number of circumstances. Thus by the *Leges Burgorum* a person was to be put to death if he stole to the value of thirty-two pennies and a half. At another time theft by a member of the upper classes was dealt with and punished as treason. The sentence following upon a conviction of theft in comparatively modern times has, as appears from the cases quoted by Hume, varied remarkably. A capital sentence has certainly been pronounced, and even carried into execution, within this century. On the other hand, minor acts of theft seem to have been dealt with leniently. It need hardly be said that a capital conviction in any case of theft, however serious, is now out of the question. According to Hume, who has carefully examined the records of the Justiciary Court, an act of theft was only punished capitally if *furtum grave*, or aggravated either by habit and repute or previous convictions. "But what," says he, "shall be esteemed a *furtum grave* or great theft such as shall bring the panel into hazard of his life? And he goes on to point out that the circumstances brought out at the trial may have to be taken into account. Our most recent writer upon criminal law seems to treat the distinction of *furtum grave* as now quite obsolete. There seems to be no fixed rule as to the number of previous convictions requisite to render an act of theft a capital offence. This matter also depends entirely upon cir-

cumstances. It would therefore appear, looking to Wilson's case, that a very great discretion indeed is vested in the Lord Advocate. Upon the plea that a crime is still in strict law capital, he could refuse bail in certainly the great majority of offences. It is surely desirable that the class of non-bailable offences should be distinctly set forth by statute. A list of such offences has indeed been made out for the guidance of Crown officials, but of course it has no binding authority.

### THE ADMINISTRATION OF JUSTICE IN RUSSIA AS ILLUSTRATED BY ITS PROVERBS.

BALLADS do not make the history of a country—*pace* Fletcher of Saltoun—otherwise Scotland would be Jacobite; but they help. If it is probable that ballads tend to make the history of a country, it is certain that proverbs illustrate the sentiments of its people. From an article on "Russian Proverbs," in the last number of the *Quarterly Review*, we make the following extracts illustrative of the popular sentiment among the Muscovites regarding the administration of justice:—

"That it was terribly corrupt many of them assert or suggest. 'Fear not the law, but the judge,' says one; 'God loves the just, but judges love the pettifogger,' is a Siberian saying; 'What are laws to me, if I know the judges?' asks a third; while a number of others chime in with, 'Before God with justice, but before the judge with coin;' or, 'Before God set a taper, before the judge a purse;' or, 'A judge is like a carpenter; what he wants, that he carves out;' or, 'The devils themselves have scratched their heads at such a decision.' Bribes were always forbidden; but, in the sixteenth century, judges were allowed on Easter Sunday to receive money as well as the customary 'red egg,' whence arose the saying, thinks Snegiref, which asserts that 'Eggs are dear on Easter Sunday,'—one which now means that every service is dear, or well appreciated on that day. Of the *Yaryzhka*, a kind of police-officer, the memory is preserved in the warning, that 'He who consorts with a *Yaryzhka* will find himself without a shirt.'

"To the administration of justice numerous proverbs refer—usually in unfavourable terms—holding that 'First is most right;' or, 'The stronger is the most in the right.' To civil cases allude the statements about sureties: 'Who goes bail, he will suffer,' and, 'I bailed him out, he taught me a lesson;' and about witnesses: 'A wife cannot give evidence against her husband,' 'A Christianised Jew and a reconciled foe' (are not to be trusted). Peter I., it may be observed, ordered that not only should not a man's present enemies be accepted as witnesses against him, but not even his professed friends, if they had ever been inimical to him. 'A sister can never be an heiress while her brother lives,' is merely a legal statement; but it takes a genuinely proverbial form in 'a cut-off slice does not belong to the loaf'—a married daughter

being, as it were, cut off from her family after her dower has been paid. Among proverbs relating to criminal law: 'Better forgive ten guilty, than punish one guiltless,' is threadbare with use; but there is an air of novelty about 'The blood of the guilty is water, but of the innocent a woe.' 'By fighting shalt thou not be righted,' refers to ukases against 'self-help' in case of injury. An olden proverb says, 'One's own justice is shortest,' but this may be intended only for princely application. 'Better is it to die, but not to kiss the cross,' is a proof of the sanctity attached to an oath in Russia. It is edifying to compare the solemnity with which an oath is administered at the present day in a Russian court of law with the corresponding process in our own country. [That is in England. In Scotland the mode of administering the oath is solemn, even in those courts which recently abolished the day of judgment.]

"To the employment of torture as a means of getting at the truth—a blot on Russian justice not removed till 1801—allusion is often made by proverbs. Sometimes the allusion is direct, as in 'They break ribs when they torture the thief,' or, 'Thrice torture they the thief.' The latter saying is explained by the fact that a robber might be tortured three times in a day; but if he held out, he could be tormented no more. An insolvent debtor, or a peasant behindhand with his dues, will sometimes say, even in modern times, 'Though you burn me to a cinder, yet have I nowhere to turn to;' words which have long lost the significance they possessed at a time when it was legal to roast prisoners on a spit, or suspend them above a fire. The expressions, also, 'To roll into a duck,' and 'To bend into three ruins,' allude to the ancient custom of tying a man up in a triply-folded parcel. Among the most interesting of the indirect allusions is the following. In the phrase, 'To tell all one's secrets,' the word for 'secrets' is *podnogotnaya*. It is derived from *pod*, under, and *nogot*, the nail, and bears testimony to the practice of extracting secrets from prisoners by driving splinters under their finger-nails—a practice borrowed, according to Karamsin, from the Tartars. The saying, 'Joke not above a rouble,' and, 'A rouble guards the head,' are supposed to refer to an ukaz by which torture was forbidden in the case of thefts of small sums. It was issued in 1722, when a rouble was considered a large sum. The torture by the *dyba*, mentioned in 'Innocent in deed, but on the dyba guilty,' consisted in hoisting the sufferer into the air by a rope fastened to his hands behind his back, weights being attached to his feet. In this position he was scourged. The proverb afterwards changed into 'Innocent in deed, but on paper guilty,' innocent prisoners being often obliged to confess to crimes which they had not committed. The *viska* seems to have been the same as the *dyba*. Of another instrument of torture, the knout, the origin is unknown. Of it some proverbs speak, such as 'The knout is not the devil, but it will seek out the truth;' or, 'The knout is not the archangel, it will not pluck out the soul;' a statement more consolatory than correct.

"There is an old form of words which, although not a proverb, became proverbial, and therefore may be mentioned here as a significant commentary on the administration of justice a couple of centuries ago in Russia. *Slovo i dyelo*, 'Word and deed;' thus ran a formula which was long capable of striking terror into the boldest heart. He who employed it signified thereby that he had something of importance to communicate, but secretly, with reference to a crime against the State. As soon as he

uttered it, whether in-doors or out of doors, at a gathering in the market-place or at a social feast, he and all persons compromised by it were taken into custody. Then began a process. First of all he was tortured, to ensure the seriousness of his charge.

"To other judicial ferocities various proverbial sayings bear witness, many of which are now used in utter ignorance of their original significance. Thus of a *moloděts*, or springald, it is said: 'Though on a stake, yet a hawk,' a reference to the horrors of impalement, unknown in Russia since the sanguinary period of Biron's regency, when the Pretender Minsky was impaled in 1738. The phrase 'Inside a sack and into the waters,' alludes to the former practice of drowning in a sack wizards, parricides, and other offenders. The common Russian expression used as an equivalent for our 'thunderstruck,' or 'rooted to the ground,' to describe the temporary immobility produced by sudden fear or grief, is *hak vkopanny*, or *vkopannaya*, 'as if buried in the earth,' *kopāt* meaning to dig. This refers, as does the phrase 'Our Fofan is buried in the earth,' to the old custom of burying up to the neck, or, as the saying ran, 'up to the ears,' certain offenders, such as women who had killed their husbands, and keeping watch over them till they died. This punishment was abolished in 1689, but the superstitious practice of burying a villager alive in a sack, together with a dog, a cat, and a cock, in order to keep off the cattle plague from a village, may still be kept up in some dark retreat, some backwater in the stream of Russian life. That the practice throws a valuable light upon the old Roman punishment for parricide scarcely need be pointed out.

"The method of recovering debts during the period of the Tsars, savagely simple in its nature, gave rise to a number of proverbial sayings, some of which still exist, but in a form which now-a-days requires explanation. Thus, 'A brother has paid a brother with his head,' conveys but little meaning to a hearer who does not know that of old an insolvent debtor was made over as a slave to his creditor. This surrender bore the name of *otdacha golovoyu*, a rendering of the Western *editio capitis*, the slave being regarded as *sine capite* or 'headless.' A creditor was originally allowed to treat the debtor thus handed over to him as a slave, and might beat him with impunity to any extent short of death. Even as late as the beginning of the eighteenth century, a debtor might be made over, together with his wife and children, to his creditor, in order to work off his debt. But as a male labourer could earn only a few roubles a year, and a female still fewer, the creditor was obliged to feed and clothe them while in his service. Not only were debtors thus figuratively deprived of their heads, but some other offenders also. Thus, in 1589, Prince Gvosdef was in this manner placed in the power of Prince Odoefsky, with whom he had quarrelled on a question of *myestnichestvo*, or precedence. When a grandee was thus humiliated, his enslavement was merely nominal, but he was obliged to throw himself on the ground before the person to whom his head was supposed to belong, and remain prostrated till he received permission to rise in the words, 'The repentant head will not the sword strike: God forgive thee!' A method of recovering debts, which is still employed in India, was long current among the Russians—that of sitting at a debtor's gate until he is shamed or frightened into paying what he owes. A more savage method is supposed to have been brought into Russia from Central Asia or China

by the Tartars—that of the *pravězh*.<sup>1</sup> ‘Give time; beat not off from the legs;’ ‘The heart has sinned but the legs are found guilty;’ are still current expressions which originally referred to the practice of setting insolvent or obstinate debtors ‘on the *pravězh*,’ and beating them on the legs with sticks. This summary proceeding was suspended by Peter I., but it was revived under the Empress Anne by the ferocious Biron. By his orders, the peasants who, in consequence of a famine, were unable to pay their taxes, were compelled to stand bare-legged on the snow during a severe winter, and were beaten on their shins and the soles of their feet. The final abolishment of this refinement on the bastinado gave rise to a saying among the people, ‘You can’t set me on the *pravězh*, forsooth!’ The following phrase formerly referred to the *pravězh*, but it is now used when a visitor will not sit down: ‘In legs is there no justice.’”

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## Reviews.

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*Parliament-House Book for 1875-76.* Edinburgh: Burness. 1875.

THE new issue, the fifty-first, of this useful compendium reached us too late for notice last month. It is as useful as ever, and what can one say more? The new issue contains, besides the old matter, all the statutes of last session which are required in the active practice of the law, such as the Act as to Appeals in Summary Prosecutions, the Act for the relief of the Widows and Children of Intestates when the personal estate is of small value, and the Entail Amendment Act.

*The Friendly Societies' Act, with Introduction and Notes on Clauses.*  
By HUGH BARCLAY, Esq., LL.D. Glasgow. 1875.

THIS is an excellent practical manual on the law of Friendly and other Societies, from the pen of an able writer—Dr. Barclay. The subject of these Societies is one of considerable importance, and has occupied the attention of the Legislature a good deal of late years. In one form or another, Friendly Societies have existed in this country for at least 300 years, and there are numerous associations of the kind scattered over the kingdom. It was not, however, until about 80 years ago that these Societies were made an object of statutory protection and legislation, but since then no fewer than *nineteen* enactments have been passed regarding them, *sixteen* of which were repealed when a Royal Commission was issued five years ago to inquire into the operation of the three which then

<sup>1</sup> “Derived from the root which has given rise to so many words like *pravý* or ‘right,’ *pravda* or ‘truth,’ *pravit* or ‘to rule,’ *pravilo* or ‘a rule,’ etc. In his ‘*Russee Common Wealth*,’ Dr. Fletcher gives a graphic account of the poor debtors whom he saw ‘stand together on the *pravězh* all on a rowe, and their shinnies thus becudgelled and bebasted every morning with a piteous crie.’”



claimed vitality. The Commissioners appointed under this commission soon found that a very arduous task had been devolved on them. Their labours began in 1870 and ended in 1874. During that time they examined 277 witnesses—several of these more than once—and they made four reports, the last of which was issued in 1874, and extended to 347 pages, including appendices. These extensive labours and exhaustive reports culminated last August in an elaborate statute, which is now the subsisting legislation on the subject; and Dr. Barclay, than whom there is no one better qualified for the task, has prepared and now presents in a cheap and handy form the full text of that statute, along with good practical notes on its sections, and a remarkably concise yet comprehensive introductory chapter containing a *résumé* of the former legislation on the subject, and an analysis of the Commissioners' last report, both of which will greatly help to a clearer understanding of the statute itself.

*The History of Modern English Law.* By Sir ROLAND WILSON.  
London: Rivingtons. 1875.

THIS work, which forms one of Mr. Oscar Browning's series of "Historical Handbooks," published by Messrs. Rivington, is, like the "History of English Institutions," by Mr. Philip Smith, in the same series, a sign that English lawyers now desire to redeem their profession from the reproach that it cares for nothing but the bare necessities of practice. The idea of showing in a concise view the changes which English law has undergone in the last century, and indicating the further changes which must sooner or later follow in their train, is a very good one. It would be desirable, however, that similar handbooks should be prepared tracing the earlier periods—for it would be a pity to fall again into Bentham's mistake of seeing in these only the errors. The Private, no less than the Constitutional law of Britain, must be studied as a whole to be understood or estimated at its fair value. The indiscriminating censure of the radical reformer is as much out of place as the indiscriminating panegyric of the conservative lawyer. But though we may feel that a Code is the natural goal of recent reforms, we cannot share in the regret that this work was not accomplished by Bentham or Austin. It is the merit of Sir Henry Maine that, without the profound erudition of Savigny, he has, by a lucid style and suggestive conceptions, drawn attention to the importance in England, as in Germany, of studying the historical development of the law. When this branch of study has been matured, and our lawyers have learnt the art of concise and precise expression which distinguished the Roman jurists, but not till then, the time will be ripe for the formation of a Code. The future British Code ought to excel the modern German attempts in this direction as much as these do the Codes of Frederick the Great and Napoleon—as much

as the Common and Equity Law of England surpassed the actual law administered in any foreign country prior to the adoption of Codes. The work of Sir Roland Wilson, though superior to the vague and ill-digested compilations of Professor Sheldon Amos, proves how far we are from having reached this point. It is divided into three parts, the first is a sketch of the law in the time of Blackstone; the second is devoted to the life and work of Bentham; and the third gives an outline of the legal changes since 1825. The table, p. 10, which forms the basis of the arrangement of the first and third parts, is said "to be put together in a somewhat eclectic fashion, from the diverse system of Bentham, Austin, and J. S. Mill." This use of the tabular method was characteristic of Bentham, who, probably unconsciously, borrowed it from the earlier English legal writers whom he despised—but the particular distribution of the different parts of law was Austin's, based on a curious mixture of Bentham's nomenclature and that of the Roman jurists. It was explained in a lucid essay by Mr. Mill, who had heard Austin's lectures, and has been copied with minor variations by almost all subsequent English writers, including the present author. It has the advantage of presenting at one view a conspectus of the subject, but is not free from serious errors both in substance and expression, which it is not creditable to find repeated in treatise after treatise, much in the same way as legal text-books copy strings of precedents with the misquotations of the original compiler. The division of law with which it starts—into Substantive or the Law of Rights, and Adjective or the Law of Procedure, was one invented by Bentham, but rejected by Austin on the ground (1) that the phrase "adjective" was objectional, and (2) that the law of procedure truly relates to those rights which he denominated secondary, and explained as arising directly and exclusively from injuries or wrongs. The first objection is well founded when limited to an objection to the name, for it is clearly inexpedient to adopt terms which have been appropriated by another science—grammar, and use them in an analogical sense which is only partially true. But the separation of the Law of Rights from the Law of Procedure is a necessary one in any system. Austin's second objection rests on a misconception of the meaning of this separation, and Sir Roland Wilson, by making wrongs and remedies a subdivision of Substantive Law or the Law of Rights, has fallen into the same error. The true view of regarding the subject is this—all rights may be considered either as existing in their perfect state or as injured or violated by a wrongdoer. It is the object of the Law of Rights to describe and distinguish the various classes of rights in their perfect or inviolate state; it is the object of the Law of Wrongs and Remedies (procedure in the widest sense) to describe the different kinds of violation of rights and the remedies which the law gives for these violations. No doubt the term procedure is sometimes used in a much narrower sense for the mere *cursus curiæ*, which may differ in various countries or various courts, but this is

a sense which has no place in any such general tables as those of Austin or the present writer. To avoid, however, this ambiguity, as well as the use of the phrases substantive and adjective, the proper division of law in general appears to be into—(I.) Rights; (II.) Wrongs or Violations of Rights; and (III.) Remedies for the Prevention or the Redress of Wrongs.

In his subdivision of Rights, Sir R. Wilson uses another unfortunate terminology, which, strangely enough, even Austin did not entirely discard, though no one insisted with more vehemence on the distinction between law and morality. He divides Rights into (1) Rights with corresponding Duties, and (2) Absolute Duties. Now the word "duty" should never be used in any system of legal classification while the more precise term "obligation" exists. To do so leads to the supposition that the duties of morality, as our duty to God and our neighbour, are duties enforceable by law. As for the division entitled absolute duties, which is explained to mean "those which have no individual rights corresponding to them," it turns out by the examples given, *e.g.*, registration of births, deaths, and marriages, that they are obligations imposed by statute on behalf of the State. These are not therefore properly obligations without corresponding rights, but the rights to which they correspond belong not to individuals but to the State. Why the State, any more than other minor corporations, should not be recognized as a body capable of possessing rights, neither Mr. Austin nor Mr. Mill, when they determined to exclude public law from their classification, as of course the present writer also does, ever explained. It is to public law that the class of obligations called absolute duties properly belong. In dividing rights into those *in rem* and *in personam*, Sir R. Wilson follows Austin in introducing phrases of the civil law of Rome, which will probably be continued in English systems till some one has found simple and appropriate English for the distinction between rights which exist in reference to all the world, and rights which exist only in reference to particular persons. Might not this distinction be expressed by calling the former absolute, and the latter relative rights? A most unlucky misprint, p. 12, might lead the reader to suppose that Sir R. Wilson regarded rights *in personam* as "such rights as that of a man to the free use of his limbs or his property," which of course are rights *in rem* and not *in personam*. For status and the family relations, Sir R. Wilson, like Austin, finds no more appropriate place than under the head of special law, which involves the dilemma either that they do not give rise to rights, or that his division of rights is not, as it pretends to be, exhaustive. The fact is that such rights partake in part of the character of rights *in rem* and in part of those *in personam*, but this is a point to explain which in detail would be inappropriate in a short notice. For the same reason we cannot enter into some other matters requiring rectification in the proposed table.

The statement of the law as it was in Blackstone's time, which is

contained in chapters i. to v., is not sufficiently exact for the young legal student, but may be of some service to a lay reader; still, even such a reader requires to be cautioned against accepting implicitly the views of so thorough-going a disciple of Bentham. It is quite in keeping with this position that the whole of Part II. is devoted to the life and work of Bentham. Certainly no single lawyer has done so much for law reform as Bentham, and the stand he made against professional prejudices and sinister interests deserves the greatest praise and more frequent imitation. But when we bear in mind the difficulty of carrying out in practice the best-conceived theories of law reform, a considerable share of credit must be given to such lawyers as Mackintosh and Romilly, and to such Chancellors as Brougham, Westbury, Selborne, and Cairns. That so much more remains to be done in the direction of codification, is not the fault of lawyers so much as of the general public, who take little interest in the matter. The gravest abuses have been remedied, and who cares whether the law of England is put in a form which may compare without disadvantage with that which most Continental countries now enjoy?—It must be confessed only a handful of young lawyers with little or no practice, a few persons who have in their own affairs been irritated by the law's delays, expense and unintelligibility, and the discredited sect of social reformers who are regarded by most men as crotchett-mongers and busybodies. This will not be altered till the study of the law becomes more general amongst educated laymen, for we can scarcely look forward to a naive idea of Sir Roland Wilson's being realized, save in Utopia—that a code will be produced first as a "private literary undertaking, which will so attract and claim the reading part of the nation that they will cry aloud not for a code, but for *the* code, the whole code, and nothing but the code."

The third part of the work, which treats of the changes in the law since 1825, is the best. The connected view of the restriction of capital punishment since 1825, by the series of acts which Romilly initiated (p. 244), the changes in the constitution of the Courts (p. 244), and the sketch of the legislation with regard to companies (p. 271), may be specially pointed out. There is, however, a want of clearness here also in some of the views indicated, as when, after stating truly enough that trial by jury is on its trial, it is added, "a time seems to have come when its principle should be either definitely abandoned or be much more thoroughly and impartially carried out." The true remedy for its abuses is here missed—which would be to restrict it to criminal and such civil cases as have a partially criminal character, or require in the public interest to be decided by members of the public, and not by professional judges. A piece of good advice to persons asked to become trustees will have an interest to many, and is we believe too well founded: "They get nothing by it, and may incur a good deal of trouble and responsibility, they may be made to pay out of their own pocket for yielding too readily to the importunities of the friend who asked them to assume the

office, for the misconduct of a co-trustee, for misconstruing an ill-drawn instrument, or for a mistaken view of some doubtful point of law." While unable to commend this little book as thoroughly well executed, its author deserves credit for good intentions, and for having collected a good deal of useful information.

Æ. M.

## NOTES IN THE INNER HOUSE.

WINTER SESSION, 1875-76.

*Alienation of Pupils' Real Estate.*—Our Courts have been very chary in giving sanction to applications on the part of guardians to alienate the landed estate of their pupils. Nay more, they have shown so great an aversion to such alienations, that where, as in the case of *Vere v. Dale*, 20th February 1804, M. 16,389, the sanction of the Court had been given to such an application where there was no necessity requiring, but only a great advantage to the pupil recommending the alienation, the sanction of the Court was afterwards held to give no protection to the transaction. In the case of *Finlayson v. Finlayson*, 22d December 1810, F. C., it was laid down as settled law "that great necessity was the only ground on which the Court could authorize the sale of a minor's estate, and that no views of expediency, however clear, were sufficient." In *Colt's Tutors*, M. App. voce Tutor, 1 (1801), this rule was laid down: "The Court may, with propriety, sanction an alienation of a pupil's heritage where the sale is necessary for the payment of debt, for the minor's aliment, and in cases of urgency to avoid loss. But the Court ought not to interfere merely from views of procuring future advantage to the minor."

There is necessity and necessity, and in determining what is *legal necessity* the Courts, while throwing out of view considerations of probable gain (which they must do, or else put themselves in the position of managers of the property of the ward), have not put out of sight considerations of immediate and gross disadvantage. An instructive case on this subject has recently been decided by the First Division. We refer to the case of *Lord Clinton and Saye*, October 30, 1875. Sir J. S. Forbes of Pitsligo, the grandfather of the ward, conceived the idea of erecting a village on his estate. He had a feuing-plan prepared, streets and roads laid out, embracing an area of twenty acres. At his death eleven acres were feued out. After the succession of the pupil to the estate, a provisional order was obtained, authorizing expenditure on the works of the harbour of the place (Sandhaven), and power was given to borrow £16,000. A considerable sum had been expended on these works. The pupil had obviously a strong interest in the extension and prosperity of the village, and it was obvious that if the feuing ceased, fishermen would have less inducement to resort to the harbour on which so much had been expended. The Court

held that a strong case of legal necessity had been made out, and granted the prayer of the petition presented by the tutor for power to feu.

*Sheriff's Jurisdiction.*—The case of *Robertson v. Cockburn*, decided October 23, by the Second Division, is not without interest viewed in connection with a recent discussion in which all the legal bodies took part. The principal point raised by the Sheriff Court Bill, which, after having been aired before the public for some time, met its fate along with other innocents at the end of the Parliamentary Session, was the question of the Sheriff's jurisdiction in heritable matters. It was maintained by many that the limitation of the Sheriff's jurisdiction worked as a hardship to poor litigants, who could not have their real rights decided in a cheap court, but were obliged to come to Edinburgh. Another objection to the present state of things was not however so much dwelt upon. Not only are there limits to the Sheriff's jurisdiction, but it is very uncertain what these limits are. Speaking generally, actions relating to moveable rights are competent, and those which relate to heritable rights are incompetent. But a glance at the decisions is sufficient to show that in practice the boundary line is by no means clear or distinct, and that in fact the nicest and most delicate questions ever raised in the Sheriff Court are just questions of jurisdiction. We do not say that this fact alone would warrant some such legislation as we have seen proposed. But it is right that it should be pointed out and considered. A litigant may go to the Sheriff Court, raise his action there, and have it dismissed on the ground that he has mistaken his Court, and must seek his remedy in the Parliament House. He may go to the Parliament House, only to find that the Sheriff was mistaken in his view of the law, and see his case sent back again to the inferior tribunal from whence it came, and where all along it should have been. This was precisely what happened in this case of *Robertson v. Cockburn*, to which we are now to call our readers' attention. The facts are very simple, and can be briefly stated. Robertson, the pursuer, was the proprietor of some heritable property in Edinburgh. He raised an action against Cockburn to compel him to implement a certain lease for five years alleged to have been entered into, and for damages in the event of his failing to implement. The defender denied that there ever had been any formal contract of lease between them, but he did not raise the question of jurisdiction. The Sheriff-Substitute (Hallard), however, took an objection to the competency of the action, and that apparently upon two grounds. We all know that a Sheriff dare not touch anything of the nature of a declarator—why so, is not clear, but custom has reserved declarators as things sacred to the Lords of Session. In this particular action, though the Sheriff was not in so many words asked to declare anything, he thought that virtually its object was to have the lease declared valid and binding. Upon that ground, therefore, he

gardener, however he may quail before scientific acquirements and horticultural ambitions, that he must confine the expenditure of his department to a certain figure. This Mr. Leslie did; he paid heavy bills, which, however, appeared to him to be within the bounds of reason, but he fixed a limit, allowing £600 a year for expenditure on the garden; and the gardener warned the nurserymen that his authority was limited. He did not, however explain what the precise limit was, and the tradesmen did not trouble themselves to inquire whether they were passing the bounds fixed by Mr. Leslie. They do not seem ever to have asked Mr. Leslie, or even the gardener, what was the fixed sum allowed, or how far they were to go on executing extravagant orders. The owner was abroad, the gardener had engaged in a keen competition with some neighbours and rivals at horticultural shows, and continued to stock Mr. Leslie's garden with rare plants at the rate of £25 a piece. There can be no doubt about his conduct; but it must be borne in mind that he was subject to a strong temptation to spend, inasmuch as he received a percentage on all the business he brought to the nurserymen. His extravagance could not have inflicted such a heavy loss on his employer if it had not been for the culpable carelessness of the plaintiffs. On this question of every-day morality Baron Bramwell spoke strongly; but, as the verdict of the jury has proved, his censure was by no means unnecessary. It is, indeed, a question which, if tradespeople do not take care, will uproot altogether the credit system, on which so much of their profits depend. Wealthy people must get most of their purchasing done by deputy, and they must place confidence within moderate bounds in those to whom they delegate that business. But, obviously, there cannot be conceded to a servant, in any save a few most exceptional cases, an unlimited right to pledge his master's credit. Mr. Leslie declares that he knew nothing of the extravagant outlay to which his gardener was committing him; he saw the plants, perhaps, but, not having a cultivated eye, he could not tell that he was being charged £25 a piece for them. It did not occur to him, therefore, to check an expenditure which he had no reason to suppose had exceeded the very liberal sum he had fixed upon in his arrangements with the gardener himself.

The plaintiffs were obliged to admit that they knew of the limitation of the gardener's authority, that they never took the trouble to inquire what the precise nature of that limitation was, and that they went on supplying goods far beyond the amount of any previous bills. It was also acknowledged that the moment Mr. Leslie heard of the extravagant claim which was made upon him he repudiated it. So far it is clear that the risk fell upon the plaintiffs, who took no proper precautions, or rather, we may say, no precautions at all. But then they urge that Mr. Leslie ought to have asked them to take back their plants at once, while identification was possible; that he ought not to have gone on "enjoying" things for which he did not intend to pay. Baron Bramwell very rightly declined to accept in all its bearings the obligation implied in this argument. If a tradesman delivers goods without a proper order, and the person to whom they are delivered, as soon as the transaction is brought to his notice, repudiates the order, the latter is not obliged to insist that the tradesmen shall come and carry back his wares. It is for the tradesman to propose this, if he cares to do so. But the nurserymen who sent in their astounding bills to Mr. Leslie had no intention of doing anything of the kind. They stood upon their "account," and it would be satisfactory to know that such claims are not sustained by English juries. The jury in the Court of Exchequer very possibly sympathised with the disappointed tradesmen; but the public will sympathise rather with the gentleman whose pocket would have been spared if the tradesmen who now complain had exercised common mercantile prudence, and had refrained from the questionable practice of giving a percentage on purchases to servants. Even if these nurserymen had no intimation that the gardener's authority to order goods was limited, common sense should have warned them to make some inquiry when they found the orders mounting up rapidly to thousands of pounds.

How are we to account for this amazing negligence? We are inclined to agree with Baron Bramwell that the fact is not altogether to be explained away by the tradesmen's desire of profit. Very decent people do this sort of thing deliberately, and invent excuses for doing it with astonishing ingenuity. They say, "We should offend the master if we troubled him with letters about business while he is enjoying himself abroad; and we should offend the gardener if we were to question his authority to do as he likes." This is very well, but is it reasonable that Mr. Leslie and other people in the same position should be made to pay for the nurserymen's desire to keep on good terms with their customers? The truth is there is a scarcely sane craving among tradespeople to do a great business, which places tradespeople at the mercy of servants such as Mr. Leslie's gardener. But it is the interest, and indeed the duty of every one in whose case such an imposition is attempted, to resist and resent it. Mr. Leslie has done a public service by bringing the matter into Court, and though the jury has shown a disinclination to let the tradesmen bear the consequence of his folly, the sound admonitions of the Bench will not, we trust, be thrown away upon those who rely on being protected against the results of their complaisance by elastic interpretations of the Doctrine of Agency.—*The Times*.

*Appointments.*—Sir RICHARD BAGGALLAY, Q.C., M.P., has been appointed an Ordinary Judge of the Court of Appeal. The new judge was born in 1816. He was educated at Caius College, Cambridge, where he graduated as B.A. (fourteenth wrangler) in 1839. He was called to the bar at Lincoln's Inn in Trinity Term, 1843, and became an equity draftsman and conveyancer. He was created a Queen's Counsel in 1861, after which time he confined his practice to the Rolls Court. In 1865 he was elected M.P. for Hereford in the Conservative interest, and in September 1868, he succeeded Mr. Justice Brett as Solicitor-General. At the general election in 1868 he lost his seat for Hereford, and failed to regain it when a new election took place on the occasion of the candidate who had been successful at the general election being unseated for bribery. In 1870 he succeeded the present Viscount Midleton as M.P. for Mid-Surrey, and he has since retained the seat without opposition. In February 1874, Sir Richard Baggallay was re-appointed Solicitor-General, and two months later (Sir John Karslake having resigned through ill-health) he became Attorney-General.

Mr. HENRY ORMSBY, Q.C., Attorney-General for Ireland, has been appointed to the office of Second Judge of the Landed Estates Court, which has been vacant since the death of Judge Lynch. The new judge was born in 1812, was educated at Trinity College, Dublin, and was called to the Bar in 1835. He became a Queen's Counsel in 1858, and a bencher of the King's Inn in 1874. In the autumn of 1868 he was appointed Solicitor-General, but within a few weeks of his appointment Mr. Disraeli's Government retired from office. He was again Solicitor-General from February till December 1874, when he succeeded Dr. Ball, the present Lord Chancellor of Ireland, as Attorney-General. "The action of the Government," says the *Irish Law Times*, "in appointing Mr. Ormsby to the long-vacant second judgeship of the Landed Estates Court, has commanded a universal expression of public and professional approval." The Hon. Mr. Plunket retains his present



position of Solicitor-General for Ireland, and the office of Attorney-General, vacant by the elevation of Mr. Ormsby to the Bench, is filled up by the appointment of Mr. May, Q.C., who was called to the Irish Bar in 1844, and obtained a silk gown in 1865.

Mr. WILLIAM ALEXANDER PARKER, Chief-Justice of St. Helena, has been appointed Chief-Justice of British Honduras, in the place of Mr. Robert John Walcott. Mr. Parker was admitted a member of the Faculty of Advocates in 1853. He was chief magistrate and a member of the Legislative Assembly of the Gold Coast from 1866 to 1869, when he was appointed Chief-Justice of St. Helena, and he was made a member of the Executive Council of that island in 1871. Chief-Justice Parker obtained his first appointment during the *régime* of Lord Advocate Patton, who asserted the claims of members of the Scottish Bar to a share in colonial appointments more strenuously and successfully than any Lord-Advocate before or since. Indeed, Mr. Parker is the only loan which the Faculty of Advocates has ever given to Honduras.

Mr. J. B. L. BIRNIE, advocate, has been appointed Resident Sheriff at Airdrie on the accession of Mr. J. M. Lees to the position of additional Sheriff-Substitute in Glasgow. Mr. Birnie was called to the Bar in 1858. The allurements of a fair share of practice and the bright genial life of the Parliament House are great, but the attractions of Airdrie and its scenery are greater.

*The Deanship of the Faculty of Advocates.*—A special meeting of the Faculty of Advocates was held on the 6th ult., for the purpose of electing a successor to the late Dean of Faculty, now Lord Rutherford Clark. Three gentlemen were proposed—Mr. Horn, Vice-Dean of Faculty; Mr. Fraser, Sheriff of Renfrewshire; and Mr. Watson, Solicitor-General. On a vote being taken, 82 voted for Mr. Watson, 64 for Mr. Fraser, and 45 for Mr. Horn. On a second vote being taken as between the two gentlemen highest on the list, Mr. Watson was declared elected to the vacant office by 101 votes against 85 for Mr. Fraser. Mr. Watson was called to the Bar in 1851. He held no official appointment until the accession of the present Government to office in the early part of last year, when he was appointed Solicitor-General for Scotland.

*The New English Rule as to Service on Parties in Scotland.*—In the law reports of *The Times* we find the following notice of an alteration in procedure, which may be as well for Scotch traders to keep in mind:—"Mr. Justice Lush has just given a decision in the Court of Queen's Bench Division in regard to the suing of parties residing in Scotland. The Common Law Procedure Act contains enactments on the subject of suing parties out of England, which, however, were rendered nugatory, even as to parties carrying on business in England, but residing in Scotland, by judicial decisions, which held that they could not be served in Scotland; that service at their place of business was not sufficient unless it could be shown that it reached the party, which, as it rested on his own

acknowledgment, could very rarely be shown. The learned Judge has now held that the parties may be served in Scotland, in cases under Order 11, holding that the limitations in the enactment in the Common Law Procedure Act, sec. 18, as to service of process out of the country, is by implication repealed, as the Court of Chancery always authorized such service, and every Division of the High Court has equal jurisdiction. This decision, which will probably be applied also to Ireland, is of great practical importance, and is one of the first fruits of the Judicature Act."

*Call to the Bar.*—Mr. George Robertson Gillespie, B.A., Edinburgh, has been admitted a member of the Faculty of Advocates.

*Glasgow Winter Circuit.*—Monday 20th December, at noon. Lords Mure and Young. John Burnet, Esq., Advocate-Depute; Æneas Macbean, W.S., Clerk.

## Notes of English, American, and Colonial Cases.

**RAILWAY.**—*Omission to repair level-crossing over railway.*—Where a railway, under the powers of an Act of Parliament, crosses a highway on the level, it is the duty of the company to keep the part of the way used by the public in a state of repair suitable for the ordinary and regular traffic.—*Oliver v. The North-Eastern Railway Co.*, 43 L. J. Rep., Q. B. 198.

**FREIGHT.**—"Ship lost or not lost"—*Lien on cargo—Abandonment of voyage—Owners of Cargo.*—When money for the carriage of goods by sea is payable at the port of destination, "ship lost or not lost," and the ship is wrecked upon the voyage, the shipowner has no lien upon the goods, although the money to be paid for the carriage thereof is described as "freight" in the bills of lading. Goods were shipped on board plt.'s vessel to be carried to L. under bills of lading, whereby the "freight" was to be paid at L. "ship lost or not lost." Upon the voyage plt.'s vessel was totally wrecked, and they thereupon abandoned the adventure and took no steps to save either ship or cargo. Defts., under the instructions of the underwriters, saved a portion of the goods mentioned in the bills of lading, and forwarded them to L. A dispute having arisen as to whether plts. were entitled to a lien for the "freight" mentioned in the bill of lading, a memorandum was drawn up between plts. and defts. stating that plts. having claimed a lien "for the original freight" upon the goods saved "without allowance for the forwarding freight and expenses," defts., "the owners of such cargo," had agreed to deposit the amount of plt.'s claim to abide the event of an action. A special case having been stated for the opinion of the Court:—*Held*, that upon the agreement the only question to be argued was whether plts. could lawfully claim a lien, that they were entitled to no lien, and that judgment must be given for defts.—*Querre*, Whether under the circumstances which had happened, the plts. were entitled to recover the amount of the "freight" from the parties to the bills of lading?—*Nelson, v. Association for the Protection of Commercial Interests as respects Wrecked and Damaged Property*, 43 L. J. Rep., C. P., 218.

**WILL.**—*Precatory trust—Absolute interest.*—Under a bequest of "all my property and effects, whatsoever and wheresoever, unto my dear wife, S. L. E. (trusting that she will do justice to any children we may have) for her own absolute use and benefit," S. L. E. was held entitled to the property absolutely.—*Ellis v. Ellis*, 44 L. J. Rep. Ch.

**CHARTER-PARTY.—Demurrage—Damages for delay—Liability of Charterer.**—A charter-party between plt., the shipowner, and defts., the charterers, provided the number of loading days and the rate of discharge per working day; ten days on demurrage for all like days above the said days to be paid at the rate of fourpence per register ton per day; and charterer's liability to cease when the ship was loaded, the captain or owner having a lien on cargo for freight and demurrage.—*Held* by the Exchequer Chamber, affirming the Queen's Bench in an action for demurrage and for damages caused by detention at the port of discharge; and that the charterer's liability for all such demurrage ceased when the ship was loaded. *Semble*, the shipowner's lien for demurrage would include a claim for damages caused by detention beyond the demurrage days.—*Kish v. Cory*, 32 L. Rep. N. S. 670, Ex. Ch.

**COPYRIGHT.**—A committee of seven persons, on behalf of a religious body, compiled a hymn-book, which was registered under 54 Geo. III. c. 156 as the property of the compilers, but was published by and sold for the benefit of the religious body. No minute of consent having been registered under the Act of 5 & 6 Vict. c. 45:—*Held*, that the term of the copyright had not been extended under that Act, but ceased on the death of the last survivor of the seven compilers.—*Marnials v. Gibbons*, 43 L. J. Rep. 774.

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## The Scottish Law Magazine and Sheriff Court Reporter.

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SMALL DEBT COURT OF LANARKSHIRE, AT AIRDRIE.

Sheriff LEES.

JOHNSTONE & CO. v. GOURLAY.

**Insolvency—Failure to pay Composition—Cautioner.**—"The defender in this action," said the Sheriff-Substitute in giving judgment, "became insolvent, and on 7th November 1874 made an offer to pay all her creditors a composition of 7s. 6d. in the pound by equal instalments at three, six, and nine months. She offered no security for the payment of the first instalment, but provided a cautioner for the last two. This offer was accepted by the creditors, who undertook to discharge her of all claims they had against her when the composition had been wholly paid. The pursuers are creditors of the defr.'s, and having received no payments from her, raised this action for payment of the whole debt.

"The first point I have to notice is that this is not a discharge in the course of a sequestration, and the defr. is therefore not able to plead that under the 140th section of the Bankruptcy Act of 1856, the composition has been substituted for the original debt. Neither is it a discharge under a deed of arrangement in terms of the 35th and following sections of that Act; and therefore she has not the statutory protection against a claim for the original debt that she would have had if the discharge she got had been absolute (*Alexander v. Austin & Yusile*, 15th Nov. 1873). The discharge is in this case to be obtained under an extrajudicial settlement. It has not yet been granted, it is only a promised discharge, though fulfilment of the promise could be enforced by the defr. whenever the condition stipulated in it has been purified. Admittedly, that condition has not been purified, and as the L. J.-C. pointed out in the case of *Woods, &c., v. Ainslie* (9th Feb. 1860):—"A conditional discharge is an irrelevant defence, unless it is accompanied by an averment that the condition has been purified." It is impossible therefore for the defr. to found on the discharge as in bar of a claim for the original debt. But she urges that the pur-

suers are not justified in making this demand, seeing that they never applied for payment. I am afraid such a defence is untenable. In general it is the duty of a debtor in a debt of ascertained amount to 'make payment,' as the phrase is. Still more is this course incumbent on one to whom a privilege has been conceded. It was not for the interest of the creditors to take anything less than full payment, but it was for the interest of the defr. to preserve the concession she had got by a timeous offer of payment.

"In the last place there has to be considered whether the adjection of a cautioner for the last two instalments modifies the position of parties. I am of opinion that it does not, and that it would not have done so even though his obligation had covered all the instalments. To the cautioner it gives a right to pay for the defr.'s sake; but it does not impose on the creditors a duty to make him pay. They have not delegated the defr.'s debt to him, they have only granted her greater indulgence as to the time and manner of payment owing to the diminution of their risk of total loss that his presence affords. And, in consequence, they have given her an immunity from diligence during the currency of the periods for payment of the composition, and thereby allowed her an opportunity during these months of grace of earning her discharge. I am therefore of opinion that this action has been rightly brought, and I give the pursuers the decree they crave."

*Act.—Downie.—Alt.—Macfarlane.*

### SHERIFF COURT OF ABERDEENSHIRE.

Sheriffs GUTHRIE SMITH and COMRIE THOMSON.

MURRAY v. GRATES.—15th and 30th September 1875.

*Custody of illegitimate child—Jurisdiction of Sheriff Court.*—This was a petition, praying for the custody of her illegitimate child, brought by a domestic servant in Aberdeenshire against the child's father and the father's mother. The following interlocutors have been pronounced by the Sheriff-Substitute (Comrie Thomson), and, on appeal, by the Sheriff Principal (Guthrie Smith):—

"*Aberdeen, 15th September 1875.*—Having heard parties' procurators, and made avizandum—Repels the respondents' plea that the action is incompetent in this Court: Before answer, Allows the respondents a proof of their averments as to an alleged agreement by the petitioner to surrender the custody of the child to the respondent: Allows the petitioner a conjunct probation: And appoints the case to be enrolled, that a diet of proof may be fixed.

"JOHN COMRIE THOMSON.

"*Note.*—This is a petition by the mother of an illegitimate child upwards of six years of age, directed against the child's father and the father's mother. The allegation is that the child was taken possession of by the respondents, and that they refuse to deliver it to the petitioner.

"The defence is (1) that the action cannot competently be maintained in this Court; and (2) that if it be competent, the petitioner has agreed to waive any rights she may have had to the custody of the child. I have repelled the first plea, and allowed an inquiry into the facts before disposing of the second.

"The Sheriff has no power to deal with the permanent custody of children. The protection and guardianship of infants is the peculiar province of the Supreme Court, and this rule applies as well to bastards as to lawful children. But there are certain circumstances which warrant the interference of the Judge Ordinary. For example, he may interfere when in any sudden contingency it is proper to provide for the temporary custody of a child, until this matter shall be finally settled in the Court of Session. This, however, is not the case in the present application. But I am of opinion that the Sheriff may also interpose his authority where the party, having the undoubted legal right to the child's

custody, seeks a judicial warrant to enforce that right : and that is the case presented by this petitioner. The father of an illegitimate child has no right whatever to demand its custody, so long as it is of tender years, and even after that period he cannot force it from the mother except by refusing to pay aliment for it after the time fixed by the Court. A demand then made by the mother for aliment may be sufficiently met by an offer to take the child into its father's own house and maintain it there. But the law gives him no right whatever as regards the child. In the words of the present Lord President, 'He is under an obligation, and nothing else.' It therefore seems to me to be no usurpation of the *nobile officium* of the Supreme Court to enforce this legal right possessed by the mother. This must, of course, be done on no considerations of expediency, or of what is best for the child, but on grounds which are strictly legal. Accordingly, the objection to the competency of the petition has not been sustained.

"It may be, however, that the mother has, by agreement, transferred her right of custody to another, who, in respect of such agreement, may resist the application for delivery of the child to another. Such a transference is averred by the respondents, and before disposing of the case I desire to hear the evidence on that point. I beg to refer to the case of *Herd v. Ellis*, 20th August 1864, 3 Scot. Law Mag., p. 143. J. C. T."

"*Aberdeen, 30th September 1875.*—The Sheriff having considered the reclaiming petition for the respondents against the interlocutor of 15th September, and also the record—Dismisses the appeal: Affirms the interlocutor appealed against, and decerns. J. GUTHRIE SMITH.

"*Nota.*—The father being in law a stranger to a natural child, has no more right to its custody in competition with the mother than any third party. No question of status arises, and the Court has sufficient jurisdiction to inquire into and enforce the arrangement between the parties, if any such is still in subsistence. J. G. S."

*Act.—W. Smith.—Alt.—A. F. Wight.*

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